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IN THE

Supreme Court of the United States

October Term, 1961

No. 1020

GEORGE CANNATA & ORS.,

Appellants,

against

THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT

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Appellants appeal from the final judgment entered in this action in the Kings County Clerk's office on May 14, 1962, upon an order and remittitur of the Court of Appeals of the State of New York, dated April 26, 1962, affirming the judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department, which in turn modified the judgment of the Supreme Court of the State of New York, Kings County, by striking out a decretal paragraph dismissing the complaint and substituting therefor a paragraph adjudging that Section 72-n of the General Municipal Law is constitutional and appellants submit this statement to show that the Supreme Court of the United States has jurisdiction and that a substantial constitutional question is presented respecting the reach of the power of eminent domain.

A copy of the Court of Appeals judgment is Appendix A, hereto.

A copy of the Appellate Division judgment is Appendix B, hereto.

A copy of the Supreme Court judgment is Appendix C, hereto.

Opinions Below

The majority and dissenting opinions of the Court of Appeals are reported in 11 N. Y. 2d 210. Copies of them are attached hereto as Appendix D. The Appellate Division decision is reported in 14 A. D. 2d 813, 221 N. Y. S. 2d 457. The Supreme Court opinion is reported in 24 Misc. 2d 694, 204 N. Y. S. 2d 982.

Jurisdiction

This action was brought for a declaratory judgment that Section 72-n of the General Municipal Law of the State of New York is unconstitutional on the ground, among others, of its being repugnant to the United States Constitution. The federal constitutional question was thus raised in the complaint (R. 16):

> "14. Defendant's enterprise to assemble and acquire by condemnation in order to resell for private use is a denial of plaintiffs' rights to due process of law both under Article I, Section 6, of the Constitution of the State of New York and under the Fourteenth Amendment to the Constitution of the United States.
>
> 15. Section 72-n, both on its face and as applied herein, violates plaintiffs' rights to due process of law as provided both by Article I, Section 6, of the Constitution of the State of New York and by the Fourteenth Amendment to the Constitution of the United States."

The Court of Appeals, the highest court of the State of New York, has held the statute valid.

The judgment sought to be reviewed is dated and entered in the Kings County Clerk's office on May 14, 1962, upon the order and remittitur of the Court of Appeals dated April 26, 1962. The notice of appeal was filed in the Kings County Clerk's office on May 22, 1962.

The jurisdiction of this Court to review this case by direct appeal is invoked under 28 U. S. C. A., Section 1257(2).

The case of *New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, sustains the jurisdiction of this Court on this direct appeal.

Statute Involved

Section 72-n of the General Municipal Law, which may be found in Chapter 924 of the Session Laws of 1958, is set forth in Appendix E hereto.

Question Presented

Whether Section 72-n of the General Municipal Law of the State of New York (enacted by Chapter 924, Laws 1958) is unconstitutional on its face and as applied herein, in that it denies United States Constitution, Fourteenth Amendment, due process to appellants by authorizing the taking by condemnation of appellants' private property in a project area without tangible physical blight for the purpose of transferring the property to private parties for industrial use?

Statement

Appellants, sixty-eight homeowners in the Canarsie section of Brooklyn, brought this action for a declaratory judgment that Section 72-n of the General Municipal Law is unconstitutional on its face and as applied to the proposed redevelopment of the area in which these people live.

The judgment on appeal was made on the basis of the facts stated in the complaint.

The part of the complaint pertinent to the federal constitutional question alleges that:

Appellants' homes are within an area shown upon a diagram made by the defendant's City Planning Commission dated January 14, 1959, and proposed to be designated as a blighted, predominantly vacant area pursuant to Section 72-n (R. 11 and Ex. I, opposite R. 18).

Section 72-n bears a title which reads, as follows (R. 11):

> "Prevention of the development of slums and blighted areas and the promotion of the orderly growth of municipalities through the clearance and redevelopment of vacant or predominantly vacant areas."

The section provides, among other matters, that (R. 12):

> (a) a municipal corporation by its planning commission may make a designation of a predominantly vacant area, without tangible physical blight, as one which impairs or arrests the sound growth of the community or tends to create slums and blighted areas therein;
>
> (b) a designation shall be accompanied by a statement of the proposed land uses of the designated area, which may be solely for industrial use; and
>
> (c) a municipal corporation may acquire by condemnation the land and improvements in the designated area and may sell the same to any person, firm or corporation for industrial use.

The purpose of Section 72-n, as explained by the Joint Legislative Committee on Housing and Multiple Dwellings, is as follows (R. 12-13):

> "This bill will promote the establishment of new business and industry and greater improvement at

little or no cost to the State or its municipalities. No tax exemption or other subsidy is involved. It is designed in fact to increase tax revenues through the utilization of land which would otherwise not be available for such uses. Many areas of substantial size exist in our municipalities which can be reclaimed and developed with highly useful and productive improvements. Through this bill the attack on deterioration of property will be intensified and a large gap will be closed in the efforts being put forth for that purpose."

Under date of February 18, 1959, and pursuant to Section 72-n defendant, by its City Planning Commission, made a written designation of the area above described as a blighted predominantly vacant area, and accompanied the designation by a statement of the proposed use of the area for industrial purposes (R. 13 and Ex. II, R. 20-33).

There is no tangible physical blight in the area (R. 13).

The finding in the designation that the area is blighted is based upon subsection 1, paragraph a(1), (2) and (7) of Section 72-n, which the designation describes as follows (R. 14):

"(1) Subdivision of land into lots of such irregular form and shape or of such insufficient size, depth or width as renders them incapable of effective or economic development."

"(2) Obsolete and poorly designed street patterns with inadequate access to such vacant or predominantly vacant areas or street widths or block sizes which are unsuitable for appropriate development in such areas."

"(7) Scattered improvements which because of their incompatibility with an appropriate pattern of land use and streets, retard the development of the land."

The finding that the area is blighted is arbitrary and capricious and in violation of New York State and Federal constitutional due process (R. 14).

Defendant by its Urban Renewal Board publicly announced the employment of a private engineering firm to make preliminary plans for industrial use of the project area and the appropriation by the Board of Estimate of $50,000 for such planning (R. 15).

The designation of the area as blighted, the employment of the engineering firm and the $50,000 appropriation are part of an enterprise by defendant to assemble and acquire by condemnation the land and improvements in the project area in order to resell it for private industrial use (R. 15).

Defendant's enterprise to assemble and acquire by condemnation in order to resell for private use is a denial of New York State and Federal constitutional due process (R. 16).

Section 72-n, both on its face and as applied herein, is denial of New York State and Federal constitutional due process (R. 16).

Defendant's designation of the area as blighted and its public announcement of the employment of an engineering firm and its appropriation of $50,000 has already done injury to the plaintiffs' properties by depressing their market values. Plaintiffs maintain their homes with the aid of mortgage financing. By said acts, defendant has injured plaintiffs in their ability to maintain existing financing and to obtain new mortgage financing. (R. 17.)

By chapter 695 of the Laws of 1959 of the State of New York, effective June 30, 1959, it was declared, among other matters that (R. 17):

> "I. The legislature hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons in the State of New York; * * * that there continues to exist an acute shortage of dwellings; * * *"

If plaintiffs are deprived of their homes, they will be forced to face such acute shortage in finding new homes and will be obliged to pay exorbitant and inflated prices for such new homes as may be found (R. 17).

As already appears, the federal due process question was explicitly raised in the complaint and it was upon the allegations of the complaint that all three New York courts based their judgments. Moreover, the Supreme Court decision referred directly to the federal due process question (204 N. Y. S. 2d, at p. 992). And, in addition to the complaint, appellants also raised the federal due process question in their briefs to the Appellate Division (pp. 1-2, 18) and to the Court of Appeals (pp. 1-2, 20).

The Question Presented Is Substantial and Important

The applicable federal constitutional principle was thus stated by this Court, *Missouri Pac. Ry. Co.* v. *Nebraska*, 164 U. S. 403 17 S. Ct. 130, 135:

> "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States."

Whether a taking of private property violates this principle is a *judicial question.* In *City of Cincinnati* v. *Vester*, 281 U. S. 439, 50 S. Ct. 360, 362, Chief Justice Hughes wrote:

> "It is well established that, in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one. In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particu-

> lar the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution."

The gravamen of appellants' complaint is that the instant taking is *not* for a public purpose. The public purpose may lie in the *clearance* of a tangible physical blight (*Kaskel* v. *Impellitteri* (306 N. Y. 73, cert. den. 347 U. S. 934) or in the ultimate use to which the property is put after clearance. Where a tangible physical blight is to be cleared away, the public purpose is thereby already served and ultimate use of the property after clearance may be public or private. A slum is a tangible physical blight, but it is not the only form of tangible physical blight. A swamp is another form of tangible physical blight and there are still others. Where, as here, the ultimate use is for private industry, which is not a public purpose, the public purpose must be found in the clearance itself and that requires a finding of a tangible physical blight, whether in the form of slum or otherwise. Where the public purpose is to be found in the clearance itself, the existence of a tangible physical blight is a *condition* for the exercise of the power to take. Thus in *Kaskel* (306 N. Y. 73, 80):

> "One can conceive of a hypothetical case where the *physical* conditions of an area might be such that it would be irrational and baseless to call it substandard or insanitary, in which case, probably, the conditions for the exercise of the power would not be present."

Concededly, there is no tangible physical blight here.

The absence of tangible physical blight renders the instant taking baseless.

The statutory factors here invoked are no warrant for taking private property by condemnation for industrial use. The Commission here assigns these three statutory factors as grounds for the proposed condemnation:

(I) That the land is subdivided into plots of such form, shape and insufficient size as to prevent effective economic development (R. 22). There is no place in such situation for the exertion of public power. If such plots are to be put to industrial use, they need only be assembled. Assembling plots is private real estate business.

(II) That the streets are obsolete and of poorly designed patterns (R. 23). The only scope for the exertion of public power here is to change the City Plan and close some streets and open others. To make this an excuse for condemning the whole area and turning it over to industrial use is to permit the power of eminent domain to run amok.

(III) That the improvements are scattered and incompatible with appropriate development (R. 25). Here, too, there is no place for the exertion of public power. This, too, requires only private real estate business to assemble them for industrial purposes.

Statutes like the instant one have been held unconstitutional by the Courts of Massachusetts and Maine.

This is from *Opinion of the Justices* (332 Mass. 769, pp. 781-784):

> "The difficulty inherent in any attempt to frame a comprehensive definition of public purpose was adverted to in *Allydonn Realty Corp.* v. *Holyoke Housing Authority*, 304 Mass. 288, where an attempt was made to suggest some of the considerations that might have weight. However, in dealing with this difficult subject one proposition is thoroughly established practically everywhere, and so far as we are aware without substantial dissent, and that is that public money cannot be used for the primary purpose of acquiring either by eminent domain or by purchase private lands to be turned over or sold to private persons for private use. The leading case in this Commonwealth is *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371. * * *.

We are not unmindful of the proposed 'Legislative Declaration of Necessity' in Section 2 of the act to the effect that the tax structure of the city is threatened; that the yard will be an area of 'economic blight' and 'a potential breeding place for crime and juvenile delinquency' and will adversely affect values; that the development of the yard in the manner proposed is 'necessary to support the economic well-being of the city and the commonwealth'; that private enterprise will not undertake the orderly and integrated development of the yard, with further recitals setting forth the advantages of the plan. *Nevertheless there is no suggestion that the area is now a slum. There is only an apprehension lest it become one.* There would seem to be other means, perhaps through building and zoning regulations, of preventing that result. The project is not a slum clearance one, and the principle on which rest such cases as *Papadinis* v. *Somerville*, 331 Mass. 627, *Despatchers' Cafe Inc.* v. *Somerville Housing Authority, ante*, 259, and *Berman* v. *Parker*, 348 U. S. 26, is not applicable. * * *. It seems plain that the primary design of the bill is to provide for the acquisition of the area by the use, at the outset at least, of substantial sums of public money and later of comparatively small sums, to formulate a plan for development, including the devoting of some portions of the area to truly public uses, and the return of the remainder to private ownership to be rented or sold for private profit, with the expectation that adjacent areas and the city as a whole will benefit through the increase of taxable property and of values. *But this kind of indirect public benefit has never been deemed to render a project one for a public purpose.* This aspect of the matter was thoroughly covered in the leading case of *Lowell* v. *Boston*, 111 Mass. 454, at page 461, cited and quoted in *Opinion of the Justices*, 211 Mass. 624, 625. We do not repeat it here. A careful and sympathetic examination of the proposed act discloses the impossibility of concluding, without flying in the face of long established and well reasoned precedent, that public money spent under its provisions would be

spent for a public purpose. We answer question 14, in the negative."

And this from *Opinion of the Justices* of April 17, 1957 (152 Me. at pp. 445-447):

"Question: Would House Paper 983, Legislative Document 1407, 'An Act Relating to Industrial Development in City of Bangor,' if enacted by the Legislature, be constitutional?

Answer: We answer in the negative.

The proposed Act is designed to provide for industrial expansion in Bangor by the acquisition by the city by purchase, lease or by the exercise of the right of eminent domain of 'lots, sites, improvements and places within the City of Bangor to be used for industrial development.'

* * *

This, we are compelled to find, is a private purpose and not a public purpose under our constitution. It follows that the city may neither raise money by taxation nor acquire property by eminent domain for such purpose. There is neither the 'public use' of taxation, nor the 'public use' of eminent domain. The likelihood that public funds expended in acquisition of property might be repaid in whole or in part, or even with a profit, in its disposal does not alter the situation in its constitutional aspects. The taxpayer in the operation of the plan would be, or might be, called upon to pay therefor; and thus the constitutional bar remains firm.

We are not unmindful that the public exigencies or need for use of public monies for assistance in industrial development under the plan here proposed is determined by the Legislature (or under the Act by the city) and not by the Courts. See *Moseley* v. *York Shore Water Co.*, 94 Me. 83 (water supply); *Hayford* v. *Bangor*, 102 Me. 340 (library); *Crommett* v. *City of Portland*, 150 Me. 217, 233 (slum clearance). The value of the plan or its economic or social benefits, however, present no issues for judicial consideration. We mention these factors that it

may plainly appear that our opinion does not touch the need or desirability of the plan, but solely the constitutionality thereof.

• • •

We are unable to escape the conclusion that action under the Act would be for the direct benefit of private industry. An existing shoe factory or paper mill, let us say, within the proposed industrial area or park could not, for reasons clear to all, be authorized under our Constitution to acquire additional facilities by eminent domain. That such a course could well be of great value to the particular enterprise and so to the city or community would not affect the application of the law.

• • •

The Act in violation of these principles seeks to have the city do for private enterprise what private enterprise cannot be authorized to do for itself.

Our court in 1954, in the *Crommett* case, *supra*, in upholding the constitutionality of slum clearance in Portland, said at page 236, in considering the redevelopment phase of the program:

> 'Taken alone, the redevelopment of a city is not, in our view, a "public use" for which either taxation or taking by eminent domain may properly be utilized.'
>
> 'However beneficial it might be in a broad sense, it would clearly be unconstitutional for the Legislature to provide for the taking of any area in a city for the purpose of redevelopment by sale or lease for private purposes. Such a proposal would amount to no more than the taking of A's property for sale or lease to B on the ground that B's use would be economically or socially more desirable.'

The preamble of the Act before use reads in part:

> '*Emergency preamble.* Whereas, industrial development is essential to the preservation and betterment of the economy of the city of Bangor and its inhabitants; and

> 'Whereas, present opportunities for such development are limited under present conditions, and proposed imminent industrial development awaits the availability of an industrial area; * * *'
>
> The similarity of the purposes discussed in the extract from the court's opinion and in the preamble to the Act is at once apparent."

The gist of the majority ruling below is as follows: "The condemnation by the city of such an area as this so that it may be turned into sites for needed industries is a public use," citing cases from state courts and *Berman* v. *Parker*, 348 U. S. 26. All of the cited state court cases are distinguishable and the reach of this Court's decision in *Berman* has been misapprehended.

Graham v. *Houlihan* (147 Conn. 321, cert. den. 364 U. S. 833), the fact was that after the "disaster of August 19, 1955, the Torrington planning commission selected several sites, among them the one involved in this case, which because of the flood and other conditions, were believed to be arresting the sound growth of the city. The purpose of the selection was to plan protection against future flooding" (160 A. 2d, at p. 747). A further fact there was that in "the 1955 flood, the first floors of 70 per cent of these buildings were under water, and the buildings are vulnerable to future flooding." The public purpose was thus to remove a tangible physical blight.

Opinion of the Justices (334 Mass. 760) does not overrule the Massachusetts' decision quoted from above. It is concerned with a "blighted open area" (334 Mass., at p. 763), a definition of which is set forth in a footnote in 331 Mass. 627, at page 634, wherein it appears that such an area "is to be developed for predominantly residential purposes." While residential housing is a public purpose, the purpose in the instant case is industrial, which is not a public purpose.

Wilson v. *Long Branch* (27 N. J. 360, cert. den. 358 U. S. 873). In that case "58% of all the residential structures in the project area" had characteristics of slums (pp.

392-393) and part of the land was "swampy" (393). The public purpose here was to remove a tangible physical blight.

In *People ex rel. Adamowski* v. *Chicago Land Clearance Comm'n* (14 Ill. 2d 74), the Court wrote (p. 78):

> "However, an examination of the 1955 amendments discloses that the amendments here provide primarily for the development of the area for residential purposes."

Residential purposes, it already appears, are public purposes.

Berman v. *Parker* (348 U. S. 26), is a *slum clearance case.* Given slum clearance, the question there was whether the project area may include certain property not characteristic of slum (348 U. S. 30-31):

> "The first project undertaken under the Act relates to Project Area B in Southwest Washington, D. C. In 1950 the Planning Commission prepared and published a comprehensive plan for the District. Surveys revealed that in Area B, 64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating. In the judgment of the District's Director of Health it was necessary to redevelop Area B in the interests of public health. The population of Area B amounted to 5,012 persons, of whom 97.5% were negroes.
>
> The plan for Area B specifies the boundaries and allocates the use of the land for various purposes. It makes detailed provisions for types of dwelling units and provides that at least one-third of them are to be low-rent housing with a maximum rental of $17 per room per month.
>
> After a public hearing, the Commissioners approved the plan and the Planning Commission certified it to the Agency for execution. The Agency

undertook the preliminary steps for redevelopment of the area when this suit was brought.

Appellants own property in Area B at 712 Fourth Street, S. W. It is not used as a dwelling or place of habitation. A department store is located on it. Appellants object to the appropriation of this property for the purposes of the project."

The question there and the answer to it was the same as in the *slum clearance* case of *Kaskel* v. *Impellitteri* (306 N. Y. 73, cert. den. 347 U. S. 934). In *Berman*, this Court decided (348 U. S. 35):

"Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.

It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area."

Of *Berman*, Mr. Justice Van Voorhis wrote in the dissenting opinion below:

"All of those circumstances were noted in the opinion of the Court by Mr. Justice Douglas, who recognized that there was a basis on which the municipal planning commission could determine that the subject property was so interrelated with the slum properties that the latter could not be effectively eliminated without the former. Although the opinion

uses broad language in certain paragraphs, which do speak of unlimited power in the planning commission, these *obiter dicta* should be limited and construed by what the same Supreme Court Justice said in his dissenting opinion in *United States* v. *Wunderlich* (342 U. S. 98, 101): 'Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.' Nothing in the facts decided in *Berman* contravenes, it seems to me, the trenchant statements in the opinion in the same case of the three judge District Court (*Schneider* v. *District of Columbia*, 117 Fed. Supp. 719-720), which are perhaps more applicable to this case than to that in which the words were spoken: * * *."

The following is from pages 719-720 of the three judge District Court in that case:

"The contention as to 'blight' and 'urban redevelopment' would cover two possible factual situations: one where the plan is to redevelop an area in which no slums exist, and the other where the plan is to redevelop an area which the Government deems 'appropriate' for redevelopment but upon only a part of which slums exist. We first discuss the two possibilities separately.

The hypothesis in the first phase of this consideration is an urban area which does not breed disease or crime, is not a slum. * * * Even if the line between regulation and seizure, between the power to regulate and the power to seize, is not always etched deeply, it is there. And, even if we progress in our concepts of the 'general welfare', we are not at liberty to obliterate the boundary of governmental power fixed by the Constitution.

The terms 'public use' and 'public purpose' have never been defined with precision, and cannot be. Localities, customs and times change, and with them the needs of the public may change. But even the most liberal courts have put boundaries upon the

meanings. One eminent authority* sums up the matter by saying that the courts which go furthest in sustaining the power of eminent domain hold 'anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources for the employment of capital and labor' constitutes a public use. We think so unqualified a definition cannot be sustained, because every factory or mercantile house of any size meets that definition to some degree, and most certainly the Government has not an unrestricted power to seize one man's property and sell it to another for the building of a factory or a store. The decisions of the courts which used such sweeping language and which are cited to us fall far short of supporting the contention made to us in the present case. We shall discuss them in a moment.

It is said that the established meaning of eminent domain includes measures for the 'general welfare' and that new social doctrines have so enlarged the concept of public welfare as to include all measures designed for the public benefit. The difficulty lies somewhat in the unqualified philosophical declaration, but it lies more in the practicality that some person or persons must determine, if that be the rule, what is the public benefit. Therein lies the insuperable obstacle, in the American view. There is no more subtle means of transforming the basic concepts of our government, of shifting from the preeminence of individual rights to the preeminence of government wishes, than is afforded by redefinition of 'general welfare', as that term is used to define the Government's power of seizure. If it were to be determined that it includes whatever a commission, authorized by the Congress and appointed by the President, determines to be in interest of 'sound development', without definition of 'sound development', the ascendancy of government over the individual right to property will be complete. Such

* 2 Nichols, Eminent Domain, Sec. 7.2 *et seq.* (3d ed. 1950).

ascendancy would logically follow over the rights of free speech and press, it seems to us.

We are of opinion that the Congress, in legislating for the District of Columbia, has no power to authorize the seizure by eminent domain of property for the sole purpose of redeveloping the area according to its, or its agents', judgment of what a well-developed, well-balanced neighborhood would be; lest this sentence be misconstrued out of context, we repeat our hypothetical assumption for the purposes of this first phase of Section III of our opinion that no slum exists on the hypothetical property or in the area and that the seizure is not for a public use."

The instant statute is not in the progressive stream of legislative action for the general welfare.

Under cover of the general welfare, the instant statute provides the means to manipulate the power of eminent domain for private gain.

This case should be heard and decided on the merits.

Respectfully submitted,

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APPENDIX A

Court of Appeals Judgment

SUPREME COURT

KINGS COUNTY

GEORGE CANNATA, ROSE ST. GEORGE, HENRY CHAN, HELEN MILLER, FRED GUZZIBEL, JAMES LUTKINS, LAWRENCE SWANSON, IDA SWANSON, SEVERING MACEIRA, JOSE RIOS, FRANK REISS, WILHELMINA NACK, WING Y. LEW, PAUL PON, SALVATORE SCALISE, THERESA SCALISE, SALVATORE SCALISE, THERESA SCALISE, HARRY BRUCKNER, PEARL BRUCKNER, ISADORE DUBROW, FLORENCE DUBROW, ALLFERETTA ALVAREZ, WILLIAM ALVAREZ, JOSEPHINE LATONA, JOSEPH F. MASARACCHIA, DOMINICK BENEDETTO, ANGELINA BAGIANO, CLARA MEYER, IGNAZIO ALI, JOHN BERTUGLIA, ANTHONY BULIS, THEODORE WAHATOVICH, MICHAEL CARONIA, EDGAR TASCHDJIAN, ANNA LIPSKY, GERARD FERRAIOLI, HARRY SIRECI, BRYON KELLY GUZZIE, PETER RIZZO, BERTHA RIZZO, DU LING CHIN, SAM MILNER, HELEN MILNER, VINCENZO D'AMICO, WILLIAM BOYLE, ISOLINA BANCHIERI, MILLARD DISBROW, HELEN DISBROW, JAMES ROIG, ANNA KELLY, JOSEPH VANNUCCI, CONNIE VANNUCCI, ROSE BARBELLA, JOSEPH BARBELLA, LOUIS ELENIO, DAVID LUXEMBERG, DOROTHY LUXEMBERG, ROSA REIG, VINCENT SALERNO, JOSEPHINE SALERNO, VINCENT GIORDANO, LYDIA ANAHORY, ANTHONY CILIBRASI, ROSE CILIBRASI, EUGENE PANARESE, JAMES LEPRE, MINNIE CARDONE, and SALVATORE TODARO,

Plaintiffs-Appellants,

against

THE CITY OF NEW YORK,

Defendant-Respondent.

The plaintiffs-appellants having appealed to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court, Second Department, entered in the

Appendix A

Office of the Clerk of the County of Kings, on or about the 29th day of November, 1961, which judgment modified the judgment entered in the Office of the Clerk of the County of Kings, on or about the 21st day of September, 1960, by striking out a decretal paragraph which dismissed the complaint and substituted therefor a paragraph adjudging that section 72-n of the General Municipal Law is constitutional, and the appeal having been duly argued at the Court of Appeals and that Court in an order dated the 26th day of April, 1962, having ordered and adjudged that the judgment of the Appellate Division of the Supreme Court so appealed, be affirmed, with costs, and an order having duly been entered in the Office of the Clerk of the County of Kings on or about the 9th day of May, 1962, making the order and judgment of the Court of Appeals the order of the Supreme Court.

Now, on motion of Leo A. Larkin, Corporation Counsel, attorney for the defendant-respondent, it is

ADJUDGED that the judgment so appealed from be and the same hereby is affirmed, and it is further

ADJUDGED that the defendant-respondent, The City of New York (Municipal Building, Borough of Manhattan, New York City) recover of the plaintiffs-appellants, George Cannata (470 East 103rd Street, Brooklyn, New York) and all other plaintiffs listed in the above caption, the sum of $267.07 costs as taxed, and that said defendant-respondent have execution therefor.

Dated: May 14, 1962.
3:02 P. M.

JOSEPH B. WHITTY

APPENDIX B

Appellate Division Judgment

SUPREME COURT

COUNTY OF KINGS

[SAME TITLE]

The plaintiffs-appellants having appealed to the Appellate Division of the Supreme Court, Second Department, from the judgment entered herein in the Office of the Clerk of the County of Kings on or about the 5th day of August, 1960, dismissing the complaint herein, and the appeal having been duly argued in the Appellate Division, and that Court in an order entered in the Office of the Clerk of said Appellate Division on the 30th day of October, 1961, having unanimously ordered and adjudged that the judgment so appealed from be modified by striking out its decretal paragraph which dismissed the complaint, and by substituting therefore a paragraph adjudging that section 72-n of the General Municipal Law is constitutional, and as so modified, affirmed, without costs (and a certified copy of said Appellate Division order having been duly filed in the Office of the Clerk of the County of Kings on the 20th day of November 1961),

Now on motion of Leo A. Larkin, Corporation Counsel, attorney for the defendant-respondent it is

ADJUDGED that the judgment so appealed from be and the same hereby is modified by striking out its decretal paragraph dismissing the complaint and by substituting therefore a paragraph adjudging that Section 72-n of the General Municipal Law is constitutional, and it is further,

ADJUDGED that the judgment as so modified be and the same hereby is unanimously affirmed.

Dated: November 29, 1961.
10:13 A. M.

JOSEPH B. WHITTY,
Clerk.

APPENDIX C

Supreme Court Judgment

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

[SAME TITLE]

The defendant having moved for an order granting judgment pursuant to Rule 106, subd. 4, and Rules 112 and 113 of the Rules of Civil Practice and an order having been duly entered in the office of the clerk of the County of Kings on or about the 5th day of August, 1960 granting the motion for judgment on the pleadings and directing judgment be entered in favor of the defendant dismissing the complaint.

Now on motion of Charles H. Tenney, Corporation Counsel, Attorney for Defendant, it is

ADJUDGED that the complaint be and the same hereby is dismissed.

Dated: New York, N. Y., September 21, 1960.

JOSEPH B. WHITTY,
Clerk.

APPENDIX D

(11 N. Y. 2d 210)

Opinion

STATE OF NEW YORK

COURT OF APPEALS

No. 436

GEORGE CANNATA & ORS.,

Appellants,

vs.

THE CITY OF NEW YORK,

Respondent.

DESMOND, Ch. J.:

Sixty-eight homeowners in the Canarsie section of Brooklyn bring this suit for a declaratory judgment that section 72-n of the General Municipal Law is unconstitutional on its face and as applied to the proposed redevelopment of the area in which these people live. Since April 1961 this statute, or one like it, has become part of article 15 of the General Municipal Law but at the times here in question it was section 72-n of that law (L. 1958, ch. 924). The section authorizes cities to condemn for the purpose of reclamation or redevelopment predominantly vacant areas which are economically dead so that their existence and condition impairs the sound growth of the community and tends to develop slums and blighted areas. There are in the statute declarations by the Legislature that such reclamation and redevelopment of such areas are necessary to protect health, safety and general welfare, to promote the sound growth of the community, etc. Recited by the Legislature were a number of conditions "or combinations thereof" which "with or without tangible physical blight"

impair or arrest the sound growth of the community or tend to create slums or blighted areas. There are seven of these listed conditions as follows: subdivision of the land into lots of such form, shape or size as to be incapable of effective development; obsolete and poorly designed street patterns with inadequate access; unsuitable topographic or other physical conditions impeding the development of appropriate uses; obsolete utilities buildings unfit for use or occupancy as a result of age, obsolescence, etc.; dangerous, unsanitary or improper uses and conditions adversely affecting public health, safety or welfare; scattered improvements. The statute then goes on to declare that land assembly by individual or private enterprise for purpose of redevelopment in such areas is difficult of attainment, that the conditions above listed create tax delinquency and impair the sound growth of the community, that there is a shortage of vacant land in such communities for residential and industrial development, that it is necessary to clear, replan and redevelop such vacant land, and that for such purposes it is necessary that municipalities be given the condemnation and other powers provided by the act. It is particularly to be noted that the statute, while it becomes applicable on the existence of certain listed factors or combination of factors, expressly requires that the area is "predominantly vacant". Of the area here involved at least 75% is vacant. Section 72-n, beginning at subdivision 3(a) thereof, deseribes the procedure. The Planning Commission, after public hearing, may designate an area for these purposes providing there are findings that the area is vacant or predominantly vacant, and, in addition, findings as to the existence of some or all of the seven conditions above listed and findings that those conditions impair or arrest the sound growth of the community or tend to create slums or blighted areas. The Planning Commission must then make a detailed statement of the existing physical economical and sociological conditions in the

project area and a general statement of the new project and there must be hearings on a preliminary plan and approval of the preliminary and final plan by the local legislative body, whereupon the municipality may acquire the property by condemnation or otherwise and may sell it for the purpose of clearing, replanning, redevelopment, etc., in accordance with the final plan.

This action came into Special Term on the city's motion for a dismissal of the complaint and for summary judgment and the court held that plaintiffs are not entitled to relief. On appeal to the Appellate Division, Second Department, that court modified only to the extent of directing that judgment go for defendant city, the court holding that in an action for declaratory judgment the granting of a motion by the defendant for judgment on the pleadings properly results not in a dismissal of the complaint but in a declaration on the merits in favor of defendant. The Appellate Division, as stated, modified by directing a declaratory judgment for the city.

This complaint does not allege any failure to carry out any of the statutory procedures. It points out that the Planning Board in this case made findings not only as to the vacancy of a large part of the area but also of these statutory factors: that the land is subdivided into plots of such form, shape and insufficient size as to prevent effective economic development, that the streets are obsolete and of poorly designed patterns, and that the improvements are scattered and incompatible with appropriate development. The real basis of the complaint is its statement that there is in the area no such "tangible physical blight" as to constitute the area of slum. Plaintiffs' argument, most simply put, is that this taking is not for a "public use" because it is taking of non-slum land for development into a so-called "Industrial Park" or area set aside for new industrial development. We agree with the courts below that an area does not have to be a "slum" to make its

redevelopment a public use nor is public use negated by a plan to turn a predominantly vacant, poorly developed and organized area into a site for new industrial buildings.

We see nothing unconstitutional on the face of this statute or in its proposed application to these undisputed facts. Taking of sub-standard real estate by a municipality for redevelopment by private corporations has long been recognized as a species of public use (*Matter of Murray* v. *La Guardia*, 291 N. Y. 320; see *Kaskel* v. *Impellitteri*, 306 N. Y. 73, cert. den. 347 U. S. 934; *Cuglar* v. *Power Authority of State of N. Y.*, 3 N. Y. 2d 1006). The condemnation by the city of an area such as this so that it may be turned into sites for needed industries is a public use (see *Graham* v. *Houlihan*, 147 Conn. 321; *Opinion of the Justices*, 334 Mass. 760; *Wilson* v. *Long Branch*, 27 N. J. 360; *People ex rel. Adamowski* v. *Commission*, 14 Ill. 2d 74; *Berman* v. *Parker*, 348 U. S. 26).

The judgment should be affirmed, with costs.

VAN VOORHIS, J. (dissenting):

The appeal is from a declaratory judgment upholding the constitutionality of former section 72-n of the General Municipal Law Pursuant to this section, which is now repealed and has been reenacted in modified form in Article 15 of the General Municipal Law, the City of New York proposes to condemn about 95 acres in the Canarsie section of Brooklyn to be resold to private developers—who are as yet unidentified and uncommitted—for a project to be known as "Flatland Urban Industrial Park", which, in the opinion of the Board of Estimate and the City Planning Commission, will be more advantageous to the future of the City than the lawful uses to which the properties are being devoted by their present owners. There is no finding that any of this area is substandard or insanitary—i.e., slum. Plaintiffs are owners of 68 private residences which are not claimed to be physically deteriorated. The statute under which condemnation is undertaken authorizes acqui-

sition by the City without physical blight of "vacant or predominately vacant areas". Vacant land comprises 75% of this area. The buildings are clustered together for the most part and not scattered through the vacant lands, nor is it necessary to condemn many of them in order to utilize the vacant lands except as the City planners deem it wise to enlarge the vacant area by converting residential to industrial purposes. This is not a case of slum clearance as the condemnation site was held to be in *Kaskel* v. *Impellitteri*, 306 N. Y. 73. The present exercise of the power of eminent domain transcends anything involved therein. This kind of municipal redevelopment is not based on what was thought to have been the full scope of such enterprises by the New York State Constitutional Convention of 1938, for it goes beyond what is authorized by the housing article (Article XVIII) then added to the State Constitution, which provides only for low rent housing or the reconstruction and rehabilitation of areas that are actually substandard and insanitary. This proceeding is not instituted on the basis that this area is substandard or insanitary but that the City will be improved if real property in good condition is transferred to other private owners who, in the judgment of city planners, will use it for more progressive purposes deemed to be more in accord with development of the municipality. Such a practice may bear hard on the owner, who loses the good will connected with his location (*Banner Milling Co.* v. *State of New York*, 240 N. Y. 533) and, in a world where politics is seldom absent from municipal administration, runs the risk of having his property taken from him to be transferred to more deserving owners.

Matter of Murray v. *LaGuardia*, 291 N. Y. 310, and *Kaskel* v. *Impellitteri*, supra, marked a major step beyond what had theretofore been held to be public purposes in the exercise of the power of eminent domain. Property

owners had been accustomed to parting with their real estate involuntarily where required for governmental uses such as highways, public buildings, parks, or for the use of transportation or public utility corporations deemed to be affected with a public interest. In 1936 it was held that substandard and insanitary real estate could be condemned to be replaced with public housing or limited dividend housing corporations (*Matter of N. Y. City Housing Authority* v. *Muller*, 270 N. Y. 333). The *Murray* and *Kaskel* cases signified a departure in that there condemnation of real property was sanctioned for resale to other private owners, for ordinary private uses not affected with a public interest. The public purpose was conceived to be the elimination of slums to which resale of the subject property to other private owners was incidental. The difference of opinion on the Court in *Kaskel* v. *Impellitteri* was confined to whether the site to be condemned in that case could be classified as being slum; the Court was unanimous concerning the constitutionality of the statute there involved. Now we are faced with a further step in the socialization process. It does not necessarily follow that because the former statute was upheld this statute must be constitutional also. In ruling upon the validity of a statute like this, we are not to proceed upon the assumption that the Legislature has plenary power or none. "The state under the guise of paternal supervision may attempt covertly and gradually to mould its members to its will. The difference as so often is a difference of degree." (Cardozo: The Paradoxes of Legal Science, p. 111). I see no escape from the duty and responsibility of courts in ruling upon the constitutionality of legislation of this kind to weigh the social values which are involved, including the social value of ownership of private property, in order to determine whether the Legislature has exceeded its power under the Federal and State Constitutions.

Appendix D

Conceding that the power of eminent domain has been extended to the elimination of areas that are actually slum, the question here is whether this power can be further extended to the condemnation of factories, stores, private dwellings or vacant land which are properly maintained and are neither substandard nor insanitary, so that their owners may be deprived of them against their will to be resold to a selected group of private developers whose projects are believed by the municipal administration to be more in harmony with the times. It begs the question, in my judgment, merely to assert that such properties are to be taken to prevent them from becoming actually blighted at some future date. It is possible that there are certain definable situations where conditions can constitutionally be eliminated which tend to produce slums, before the properties have deteriorated to that level. It is possible that some of what is contemplated by this statute, including portions of this project, could be accomplished under more limited legislation. What has been attempted under a statute in a particular instance does not determine its constitutionality which is adjudged in the light of what could be done according to its terms (*Rosalsky* v. *State of New York*, 254 N. Y. 117, 121; 2 McKinney's Consolidated Laws, note 39, p. 40). The 1953 statute *sub judice* is not satisfied by eliminating slums. It provides for the elimination of potential slums, which means anything that city planners think does not conform to their designs.

It might be thought, perhaps, that in the march of progress there is no limit to the power of the Legislature even short of authorizing municipal officials to determine, through zoning or eminent domain, who shall be permitted to own real estate in cities and to what purpose each separate parcel may be devoted. The sound view is still, however, that due process includes substantive as well as merely procedural limitations and that under the mores

of the day there are substantive limits to what municipalities can do with private property, even by means of statutes enacted under the spur of single minded city planners imbued with evangelistic fervor. At some stage the rights of private property owners become entitled to be respected, even if their use of their properties does not coincide with the ideas, however enlightened, of the avant garde. The public theorists are not always correct; if they had full sway a century and a quarter ago the country would have invested its substance in the construction of canals, which any intelligent theorist would have seen was the effective way to promote the economic development of the United States. The railroads were just around the corner, but their advent was obvious to nobody. Imposing some constitutional limit to the extremely wide scope of this statute would be a far cry from returning to the days of *laissez faire*. There are those among whom the writer is one who believe that, although the Constitution does not enact Mr. Herbert Spencer's social statics, it nevertheless holds substantive content in social matters and does, at the minimum, mandate some sort of economic or social middle way. It is not for the courts to question the wisdom of the Legislature in exercising the discretion which it has within constitutional limits, but there are limits to legislative power in dealing with private property and in my view they are exceeded by the breadth of the statute on whose constitutionality we are now ruling. The fundamental principle of government still applies which the mentor of the young Cyrus tried to implant in him in ancient Persia. When asked whether a ruler should compel a subject whose coat was too large for him to trade it with another whose coat was too small, if one of them objected to the exchange, the young future ruler replied in the affirmative, for the reason that then each would have a coat that fitted him. The mentor told him that he was wrong, since

he had confused expediency with justice. The question here, it seems to me, is where to draw the line between expediency and justice. In *Berman* v. *Parker* (348 U. S. 26), the actual decision of the Court did not go beyond what this Court decided in *Kaskel* v. *Impellitteri* (306 N. Y. 73), where it was recognized in both opinions that land, buildings or improvements, not in themselves insanitary or substandard, may be included in the condemnation site if necessary for the effective clearance, replanning, reconstruction or rehabilitation of the essentially slum area of which such land or property is a part. The question before the United State Supreme Court in the *Berman* case was whether a department store could be condemned which was so connected with a blighted area that the latter could not be rehabilitated without including the land occupied by the store. That was not a case, like this, of so-called "intangible blight". The principal area there was substandard and insanitary without dispute: 64.3% of the dwellings in it were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating. All of those circumstances were noted in the opinion of the Court by Mr. Justice Douglas, who recognized that there was a basis on which the municipal planning commission could determine that the subject property was so interrelated with the slum properties that the latter could not be effectively eliminated without the former. Although the opinion uses broad language in certain paragraphs, which do speak of unlimited power in the planning commission, these *obiter dicta* should be limited and construed by what the same Supreme Court Justice said in his dissenting opinion in United States v. Wunderlich (342 U. S. 98, 101): "Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions." Nothing in the facts decided in *Berman* contravenes, it seems to me, the trenchant state-

ments in the opinion in the same case of the three judge District Court (117 Fed. Supp. 719-720), which are perhaps more applicable to this case than to that in which the words were spoken:

> "Even if the line between regulation and seizure, between the power to regulate and the power to seize, is not always etched deeply, it is there. And, even if we progress in our concepts of the 'general welfare', we are not at liberty to obliterate the boundary of governmental power fixed by the Constitution.
>
> "The terms 'public use' and 'public purpose' have never been defined with precision, and cannot be. Localities, customs and times change, and with them the needs of the public may change. But even the most liberal courts have put boundaries upon the meanings. One eminent authority* sums up the matter by saying that the courts which go furthest in sustaining the power of eminent domain hold 'anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources for the employment of capital and labor' constitutes a public use. We think so unqualified a definition cannot be sustained, because every factory or mercantile house of any size meets that definition to some degree, and most certainly, the Government has not an unrestricted power to seize one man's property and sell it to another for the building or a factory or a store. The decisions of the courts which used such sweeping language and which are cited to us

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* 2 Nichols, Eminent Domain, Sec. 7.2 *et seq.* (3d ed. 1950).

fall far short of supporting the contention made to us in the present case. We shall discuss them in a moment.

"It is said that the established meaning of eminent domain includes measures for the 'general welfare' and that new social doctrines have so enlarged the concept of public welfare as to include all measures designed for the public benefit. The difficulty lies somewhat in the unqualified philosophical declaration; but it lies more in the practicality that some person or persons must determine, if that be the rule, what is the public benefit. Therein lies the insuperable obstacle, in the American view. There is no more subtle means of transforming the basic concepts of our government, of shifting from the preeminence of individual rights to the preeminence of government wishes, than is afforded by redefinition of 'general welfare', as that term is used to define the Government's power of seizure. If it were to be determined that it includes whatever a commission, authorized by the Congress and appointed by the President, determines to be in interest of 'sound development', without definition of 'sound development', the ascendancy of government over the individual right to property will be complete. Such ascendancy would logically follow over the rights of free speech and press, it seems to us."

Few more persuasive illustrations could be found than the statute (not necessarily the particular project) now before us for decision of situations where "absolute discretion", in the language of Mr. Justice Douglas, can be "more destructive of freedom than any of man's other inventions." I do not imply that this power necessarily would be used to that end, but it potentially can be so employed. The constitutionality is to be tested by what

can be done under this statute. If we uphold its validity, that means upholding everything which is an integral part of the act that can be done under its language.

Whether or not a proposed condemnation is for a public purpose is a judicial question (*Denihan Enterprises* v. *O'Dwyer*, 302 N. Y. 451, 457). Perhaps the power of eminent domain might be invoked for the rehabilitation of vacant areas subdivided into lots of such irregular form and shape or insufficient size, depth, or width, as to render them incapable of effective or econo[illegible] development; or rendered sterile by obsolete or poorly designed street patterns with inadequate access to such vacant areas rendering them unsuitable for appropriate development. It is possible that there are other conditions enumerated in former section 72-n of the General Municipal Law which could furnish a basis for condemnation. Nevertheless this act contains, in my judgment, fundamental defects which invalidate it. Thus it declares that in event of any of the factors existing which are enumerated in subparagraph a of subdivision 1, "with or without tangible physical blight," real property may be condemned if such areas impair or arrest "the sound growth of the community and tend to create slums and blighted areas." Among the factors enumerated are unsuitable topographical or other physical conditions *impeding the development of appropriate land uses;* an obsolete system of utilities serving the area, whatever that may mean; buildings and structures unfit for use and occupancy as a result of age, obsolescence, *improper uses and conditions which adversely affect the general welfare;* scattered improvements *which retard the development of* the land. When asked upon the argument of the appeal whether this means that the power of eminent domain may be invoked in any case of this nature where, in the judgment of municipal officers, the property should be acquired and sold to some other private owners who would agree to use it for purposes that would accord more

nearly in their judgment with the progress of the municipality, the Corporation Counsel replied in the affirmative. He could hardly do otherwise, in view of the language of the statute.

Neither is it sufficiently clear or definite what constitutes a "predominantly" vacant area. In order that the power of eminent domain may be invoked for this purpose, under this statute the area to be condemned must be "vacant" or "predominantly vacant." In the case of this project it appears that the area is 75% vacant. We were told upon the argument that it would be enough if it were 50% vacant. The land which is occupied by buildings (plaintiffs' own 68 private residences which have not been found to be in inferior condition or improperly maintained) appears to be linked to the project for the reason that a larger area than the vacant land is needed for the proposed industrial park, rather than that it is an integral part of an "intangibly" blighted area. However that may be in regard to this particular project, no such limitation is imposed by the statute itself whose constitutionality is being tested, which purports to render a finding by the governing body conclusive that an area to be condemned is "predominantly vacant" so as to enable almost any proportion of buildings to be condemned along with vacant land. On the basis of indefiniteness alone it seems to me that this statute fails to meet recognized constitutional requirements (*People* v. *Grogan*, 260 N. Y. 138, 145 *et seq.*). Although the requirement of definiteness is most frequently presented in criminal cases, it has equal application to sumptuary statutes such as this depriving persons of property *in invitum*.

For the reasons stated, I dissent and vote to reverse the judgment appealed from and to grant to the plaintiffs the relief demanded in the complaint.

* * *

Judgment affirmed, with costs. Opinion by Desmond, Ch. J. All concur except Van Voorhis, J., who dissents in an opinion.

APPENDIX E

Section 72-n, General Municipal Law of the State of New York

LAWS OF NEW YORK.—By Authority

CHAPTER 924

AN ACT to amend the general municipal law, in relation to the prevention of the development or spread of slums and the promotion of the orderly growth of municipalities, through the clearance and redevelopment by municipalities of vacant or predominantly vacant areas which impair or arrest the sound growth of the municipality or tend to create slums and blighted areas

Became a law April 22, 1958, with the approval of the Governor. Passed, by a majority vote, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The general municipal law is hereby amended by adding thereto a new section, to be section seventy-two-n, to read as follows:

§ 72-n. *Prevention of the development of slums and blighted areas and the promotion of the orderly growth of municipalities through the clearance and redevelopment of vacant or predominantly vacant areas. 1. Legislative finding and declaration as to purpose of act. a. It is hereby found and declared that there exist in many municipalities within this state vacant or predominantly vacant areas characterized by the following conditions, factors or characteristics or combinations thereof, with or without tangible physical blight: (1) subdivision of land into lots of such irregular form and shape or such insufficient size, depth or*

width as renders them incapable of effective or economic development; (2) obsolete and poorly designed street patterns with inadequate access to such vacant or predominantly vacant areas or street widths or block sizes which are unsuitable for appropriate development in such areas; (3) unsuitable topographical, subsoil and other physical conditions impeding the development of appropriate land uses; (4) an obsolete system of utilities serving the area; (5) buildings and structures unfit for use and occupancy as a result of age, obsolescence, dilapidation, inadequate maintenance, or other factors affecting their physical condition; (6) dangerous, unsanitary or otherwise improper uses and conditions which adversely affect the public health, safety and general welfare; and (7) scattered improvements which, because of their incompatibility with an appropriate pattern of land use and streets, retard the development of the land.

b. It is hereby further found and declared that, by reason of such conditions, factors or characteristics or combinations thereof, with or without tangible physical blight, such areas impair or arrest the sound growth of the community and tend to create slums and blighted areas.

c. It is hereby further found and declared that by reason of the subdivision of land in such areas into small parcels in subdivided ownerships, land assembly by individual owners or private enterprise for the purpose of development or redevelopment of such areas in a manner consistent with and in furtherance of the public health, safety, morals and general welfare, is difficult of attainment and uneconomic in nature; that by reason of the conditions, factors or characteristics set forth in paragraph a of this subdivision there is a high incidence of tax delinquency exceeding the

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

fair value of the land in such areas; and that title is frequently defective or difficult to determine even through complex title searches, thereby rendering the land unmarketable and unusable without acquisition and assembly of such property by the municipality for the purpose of redevelopment thereof in a manner consistent with and in furtherance of the public health, safety and general welfare.

d. It is hereby further found and declared that while such vacant or predominantly vacant areas are appropriate for development at a greater intensity for residential, commercial, industrial, community, public or other uses or combinations thereof, the conditions, factors and characteristics described in paragraph a of this subdivision existing therein depress and destroy the economic value of such areas and also impair sources of public revenues normally capable of being derived therefrom.

e. It is hereby further found and declared that such vacant or predominantly vacant areas are presently impairing or arresting the sound growth of the community or municipality and should be made available for redevelopment in a manner consistent with and in furtherance of the public health, safety and general welfare; that there is an acute shortage of vacant or predominantly vacant land properly located for development in such manner within such municipalities; and that the clearance, replanning and development or redevelopment of such areas for residential, commercial, industrial, community, public or other uses or combinations of such uses is needed to foster the growth of said municipalities in a manner consistent with and in furtherance of the public health, safety and general welfare, by providing residential accommodations within reasonable proximity to existing employment centers, and by providing appropriately located commercial and industrial areas.

f. It is hereby further found and declared that the construction of needed public improvements throughout such municipalities, the clearance and redevelopment of substandard and unsanitary areas therein, and the rehabilitation and conservation of deteriorating areas therein are leading to a reduction in density and to the elimination of obsolete or incompatible land uses in such municipalities, and that therefore it is necessary to provide for the relocation and dispersion at proper densities of such displaced residential, commercial, industrial and other uses on properly located and suitable tracts within such vacant or predominantly vacant areas, in order effectively to prevent overcrowding and the resulting development or spread of slums and blight in other parts of the municipality.

g. It is hereby further found and declared that it is necessary to clear, replan and develop or redevelop such vacant or predominantly vacant areas for residential, commercial, industrial, community, public or other uses or combinations of such uses in order to promote and protect the public health, safety and general welfare; provide suitable areas for the relocation of persons and establishments displaced by clearance, redevelopment, rehabilitation or conservation activities or other needed public improvements elsewhere in such municipalities; that it is necessary for the accomplishment of such purposes to grant to the municipalities of this state the rights and powers herein provided and that the use of all the foregoing rights and powers for the accomplishment of such purpose or purposes is a public use and for a public purpose essential to the public interest.

2. Definitions: As used in this section, the following terms shall mean:

a. "Area." An area designated by the commission in the manner prescribed in subdivision three hereof as a vacant or predominantly vacant area which by reason of conditions,

factors or characteristics described in paragraph a of subdivision one of this section or any combination thereof with or without tangible physical blight, impairs or arrests the sound growth of the community or tends to create slums and blighted areas therein.

b. "Agency." The officer, board, body, commission, committee or agency designated pursuant to paragraph f of subdivision nine hereof.

c. "Project area." All or part of an area selected by the agency for replanning and redevelopment.

d. "Commission." The planning commission or other analogous body of the municipal corporation.

e. "Municipal corporation" or "municipality." A city or town.

f. "Governing body." (1) In a city, the board of aldermen, common council, council, commission or other body now or hereafter vested by its charter or other law with jurisdiction to enact ordinances or local laws, except that if there be a board of estimate, the term "governing body" shall mean only such board of estimate; (2) in a town, the town board.

3. Designation of area. An area shall be designated by the commission after a public hearing. Such designation shall be accompanied by:

a. a finding that the area is a vacant or predominantly vacant area which by reason of conditions, factors or characteristics described in paragraph a of subdivision one of this section or any combination thereof, with or without tangible physical blight, impairs or arrests the sound growth of the community or tends to create slums and blighted areas; and

b. a general statement of the proposed land uses, lay-out of streets, population and employment densities, building bulks and general standards for the development of the area, which form the basis for the replanning and redevelopment of the area.

4. Selection of project area; preparation of preliminary plan. The agency shall select one or more project areas. The agency shall prepare a preliminary plan of the project area, in accordance with the general standards established pursuant to subdivision three hereof. Such plan shall contain:

a. a detailed statement of existing physical, economic, and sociological conditions in the project area.

b. a general statement of (1) proposed land uses and their inter-relationship with the existing and proposed pattern of traffic and transportation in the project area and the municipality. (2) proposed community facilities and open space in connection with any proposed development. (3) proposed demolition of designated structures, and new construction, with a preliminary estimate of the number of dwelling units or amount of floor space, density, and rent levels; and (4) proposed provision of offstreet parking and loading, and contemplated methods of financing.

5. Approval of preliminary plan. Such preliminary plan shall be submitted to the governing body for its approval. Before taking action on the preliminary plan, the governing body shall refer the plan to the commission, which, after a public hearing, shall certify whether the plan conforms to the master plan, if any, of the municipal corporation and to the general standards established pursuant to subdivision three hereof. The commission shall submit a report to the governing body, not later than six weeks from the date of referral, certifying its unqualified approval, its disap-

proval, or its qualified approval with recommendations for modifications therein. If the commission shall certify its unqualified approval, the governing body, by a majority vote after a public hearing, may approve the preliminary plan. If the commission shall certify its disapproval or shall fail to make its report within six weeks from the date such plan was referred to it, the governing body after a public hearing, may nevertheless approve the preliminary plan, but only by a three-fourths vote. If the commission shall certify its qualified approval together with recommendations for modifications, the governing body, by a majority vote after a public hearing, may approve the preliminary plan and the modifications recommended by the commission or the governing body after a public hearing, may approve the preliminary plan without such modifications, but only by a three-fourths vote.

6. Preparation and approval of final plan. If the preliminary plan is approved by the governing body, the agency shall prepare a final plan of the project area, which shall include, but shall not be limited to: a detailed statement of proposed land uses and their interrelationship with the existing and proposed pattern of traffic and transportation in the project area and the municipality; proposed improvement, alteration or vacation of streets; proposed provisions for off-street parking and loading; proposed locations and easements for public utilities; proposed community facilities and open space in connection with any proposed development; proposed demolition of designated structures and elimination of nonconforming uses; proposed new construction, with the proposed number of dwelling units or amount of floor space, ground coverage, and density, estimated costs and proposed methods of financing; a program for the relocation of any families or establishments displaced from the project area; a binding offer or offers

from one or more persons, firms or corporations to undertake clearance, replanning, development or redevelopment of the property in accordance with the plan; together with a proposed time schedule for the effectuation of the plan. Such final plan shall be reviewed and shall be approved, modified or disapproved in the same manner as set forth in subdivision five of this section for the approval, modification or disapproval of the preliminary plan.

7. Acquisition of property. A municipal corporation acting through its governing body may acquire by gift, grant, devise, purchase, lease, condemnation or otherwise, in accordance with the provisions of any appropriate general, special or local law applicable to the acquisition of real property by such municipal corporation, real property whether improved or unimproved and buildings and improvements not in themselves deteriorated or deteriorating, or any interest therein, necessary for or incidental to the prevention of the development or spread of slums and blight and the promotion of the orderly growth and development of the municipality in a manner consistent with and in furtherance of the public health, safety and general welfare, through the clearance, replanning, development or redevelopment of an area or project area for residential, commercial industrial, community, public or other uses or combinations of such uses or for a purpose or purposes described in subdivision one of this section.

8. Sale of property. Such municipal corporation, acting through its governing body, may sell, any such real property to any person, firm or corporation at the highest marketable price not less than the binding offer or offers included in the final plan at public auction or by sealed bids pursuant to the provisions of any general, special or local law applicable to the sale or disposition of real property by said municipal corporation, for the purpose of clearance,

replanning, development or redevelopment of an area or project area, in accordance with the final plan adopted by the governing body and provided said sale shall be contingent upon effectuation of the specific purposes of the sale within a definite and reasonable period of time. Any deed or instrument by which the real property or any interest therein is conveyed or disposed of in such manner shall contain provisions requiring the purchaser or grantee to clear, replan, develop or redevelop such property in accordance with the final plan adopted by the governing body within the time above referred to and provisions insuring the use of such real property for purposes consistent with the prevention of the development or spread of slums and blight and the promotion of the orderly growth and development of the municipality in a manner consistent with and in furtherance of the public health, safety and general welfare, through the clearance, replanning, development and redevelopment of the area for residential, commercial, industrial, community, public or other uses or combinations of such uses or for a purpose or purposes described in subdivision one of this section.

9. Additional powers. In proceeding under this section, in addition to all other powers which it may exercise, a municipal corporation, acting through its governing body, may:

a. Issue bonds or other obligations for the acquisition of property in the same manner as for other public purposes. The period of probable usefulness of such purpose is hereby determined to be fifteen years;

b. Provide, in the discretion of the governing body, for clearance of the property including the remedying of any unsuitable topographical, subsoil or other physical conditions impeding the development of the land for appropriate use by the person, firm or corporation to whom such prop-

erty is sold. In the event that clearance is provided by th municipality, the cost of such clearance shall be financed i the same manner as acquisition costs.

c. It shall designate an appropriate board for each pro ject area to carry out all activities connected with su project area.

§ 2. This act shall take effect immediately.

Motion to Dismiss

(36838)

Office Supreme Court, U.S.
FILED
JUN 19 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. ~~1088~~

GEORGE CANNATA *et al.*,

Appellants,

against

THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

October Term, 1961

No. 1020

GEORGE CANNATA et al.,

Appellants,

against

THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

The City of New York, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss this appeal from the final order and judgment of the New York Court of Appeals affirming the dismissal of the complaint, on the ground that it does not present a substantial federal question.

Reported below: 24 Misc. 2d 694, 204 N. Y. S. 2d 982; 14 A D 2d 813, 221 N. Y. S. 2d 694; 11 N. Y. 2d 210.

The Statute Involved

Gen. Municipal Law Section 72-n as amended by L. 1960 ch. 668 is one of a series of urban renewal enactments by the New York State Legislature. It authorizes a municipal corporation (1) to acquire property by condemnation or otherwise, in a predominantly vacant economically "dead" area which arrests the sound growth of the community or

tends to create slums and blighted areas; and (2) to reclaim and redevelop such area for residential, commercial, industrial, community or other uses in order to prevent the development or spread of slums and blight and to promote the orderly growth and development of the municipality. (Subd. 7, 1 pars. b, e and g; 3 para.; 8.)

Such acquisition and redevelopment are expressly declared by the Legislature to be necessary: (1) to protect the public health, safety and general welfare (Gen. Mun. Law § 72-n, subd. 1, par. g); (2) to promote the sound growth of the community (Id., par. e); (3) to eliminate the sociological, physical and economic conditions in such areas which arrest the sound growth of the community and tend to produce slums and blighted areas (Id. pars. b, c, d, e); and (4) to alleviate the acute shortage of usable vacant land (a) as an adjunct to vitally needed programs for elimination of slums and blight and prevention of the development or spread of slums and blight in other areas of the municipalities and, (b) as an adjunct to programs for other vitally needed public improvements (Id. pars. e, f, and g).

The other New York urban renewal statutes authorize reclamation and redevelopment of improved areas in varying stages of physical, economic and social deterioration (*i.e.* Gen. Mun. Law Sections: 72-k—slum conditions; 72-l and 72-m—deteriorating areas; and 72-o deteriorating or obsolete non-residential areas; now codified in General Municipal Law Article 15). The challenged statute seeks to close a gap in the over-all urban renewal program caused by the existence of vacant blighted areas which because of the physical, economic, and sociological conditions described by statute, arrest the sound growth of the community and tend to create slums and blighted areas.

Counter-Statement of Question Presented

May a predominantly vacant, economically "dead" area be acquired by condemnation for the purpose of (i) eliminating those physical, sociological and economic condi-

tions in the area which arrest the sound growth of the community and tend to produce slums and blighted areas, and (ii) redeveloping the area for appropriate planned uses, industrial or non-industrial, to prevent the development and spread of slums and blight and to promote the sound growth and development of the municipality?

Appellants claim that condemnation is permissible only where the blighting physical, sociological and economic conditions have actually culminated in *tangible* physical blight and only where the area is to be redeveloped for residential use (Jurisdictional Statement, pp. 8, 14).

Summary of Argument

Appellee contends that the elimination of the blighting physical, sociological and economic conditions in vacant economically dead areas and the redevelopment of such areas for industrial or other uses in order to prevent the development and spread of slums and blight and to promote the sound growth of the municipality, is unquestionably a public use for which eminent domain may be exercised. The alleged absence of tangible physical blight does not detract from such public use." There is no constitutional principle which paralyzes the power of government to deal with an evil until it has reached its maximum development" *Peo.* v. *Chicago Land Clearance Commission,* 150 N. E. 2d 792, 794, (Sup. Ct., Ill., 1958). Nor is such public use in any way diminished by the fact that the public purpose of preventing recurrence of the blighting condition is to be effectuated through the redevelopment of the area for industrial uses, by private agencies, in accordance with a municipally established plan.

No substantial federal question is presented because this Court has sustained condemnation under similar circumstances and has refused repeatedly to review State and Federal decisions upholding virtually identical statutes (*infra,* pp. 8-14).

Statement of the Case

1. Present status of the Flatland's project.

The complaint sets forth the designation of the project area by the City Planning Commission (R. 20 *et seq.*). Subsequent to the date of the complaint, a preliminary plan and a final plan of the project area were approved by the City Planning Commission (R. 45-46, 60 *et seq.*; Minutes of meeting of City Planning Commission April 19, 1960, Cal. No. 2) and the Board of Estimate (January 28, 1960, Cal. No. 6; July 27, 1961, Cal. No. 36). There has as yet been no authorization to acquire the property in the project area.

2. Description and history of the proposed project site.

The proposed Flatlands project site, consisting of about 25 blocks with a gross area of 95 acres, is located in the northeastern part of the Canarsie section of Brooklyn (R. 20-21).

It is a pocket of predominantly vacant, littered, small, excessively subdivided, unmaintained lots, many of them 2 to 10 feet below actual or mapped street levels (R. 60, Exh. E, pp. 4, 7, 8, 9, 10), ungraded, unpaved and unlighted streets, open storage spaces and junkyards (R. 26).

The Canarsie Line of the BMT subway crosses the site at grade, impairing access to the area and separating a 20-acre portion from the balance of the area. The Bay Ridge Division of the Long Island Railroad extends along the entire northwest boundary on a 20-foot high embankment, further isolating the area from adjacent neighborhoods.

Although the area lies amidst fully developed or rapidly developing residential communities including Brownsville

and Canarsie and is provided with water, sewerage and power distribution systems, it is suffering from disuse and lack of development (R. 60, Exh. E, pp. 10, 11; R. 65-66).

An excessive amount of land (31 acres) is in the beds of mapped streets, leaving 64 net acres (R. 20-21). Forty-eight acres are vacant (R. 60, Exh. E, p. 7). Two acres are used for open storage and junkyards (R. 60, Exh. E, p. 7). Seven acres (slightly over 2%) have been developed for residential use consisting of 209 dwelling units generally scattered throughout the area, and seven acres are taken up with industrial uses in the northeast sector and a peripheral block on the west (R. 60, Exh. E, p. 7). Fourteen per cent of the residential structures are in poor condition, and sixteen per cent are in fair-to-poor condition (R. 60, Exh. E, p. 7). Approximately 21½ acres (or one third of the total net area) were acquired by the City for tax delinquency in 1955 and still remain in City ownership (R. 22, 60, Exh. E, p. 7).

Between 1916 and 1943 most of the area was designated on the zoning map as unrestricted with some portions designated for business and others residential. In 1943 the area was extensively rezoned from unrestricted to business, residence, and manufacturing. However, despite some zoning emphasis on residential uses, it failed to develop as a residential area. Moreover, though existing zoning has not generally encouraged industrial use, the small amount of land devolpment which has occurred in the past ten years has been mostly for manufacturing uses (R. 60, Exh. E, p. 8; Minutes of Meeting of the City Planning Commission July 14, 1943, Cal. No. 14, printed in City Record of July 14, 1943; meeting of January 10, 1951, Cal. No. 31, printed in City Record of January 16, 1951). Thus, of the 7½ acres developed within the last decade, 1½ acres were utilized for residential buildings and 6 acres for non-residential structures (R. 26).

3. The findings of the Commission.

The Commission found that the area is a predominantly vacant area which by reason of specific factors described in General Municipal Law § 72-n, impairs the sound growth of the community and tends to create slums and blighted areas (R. 20, *et seq.*, R. 60, *et seq.*). In support of this determination, it found the following unchallenged physical, economic and sociological conditions:

a. Subdivision of land into lots of such irregular form and shape or of such insufficient size, depth or width as renders them incapable of effective or economic development [R. 22; cf.: Gen. Mun. Law § 72-n subd. 1, par. a, subpar. (1)];

b. Obsolete and poorly designed street patterns with inadequate access to such predominantly vacant area, or street widths or block sizes which are unsuitable for appropriate development in such areas [R. 23; cf.: Gen. Mun. Law § 72-n subd. 1, par. a, subpar. (2)];

c. Scattered improvements, which because of their incompatibility with an appropriate pattern of land use and streets, retard the development of the land [R. 25; cf.: Gen. Mun. Law § 72-n subd. 1, par. a, subpar. (7)];

d. A high incidence of tax delinquency (R. 26; cf.: Gen. Mun. Law § 72 subd. c);

e. A destruction and depression of the economic value of the area by reason of the foregoing conditions, which impair the sources of public revenue (R. 26-27; cf.: Gen. Mun. Law § 72 subd. d);

f. A multiplicity of owners constituting a barrier to economic land assembly by private action. Prior to completion of tax foreclosure proceedings in 1955, 515 parcels in the area were held by 400 owners. At present 300 privately owned parcels are held by 250 owners (R. 25; cf.: Gen. Mun. Law § 72 subd. d);

g. Under-utilization of public and private facilities by reason of the foregoing conditions. Only 1/6 of the 24,000 linear feet of mapped streets have been paved. The Bay Ridge Division of the Long Island Railroad and its connecting facilities are also under-utilized (R. 26);

h. A deterrence of residential development because of (1) the physical containment and isolation of the area from adjacent neighborhoods; (2) the existence of a substantial industrial section on the west, and (3) the necessity for expensive and extensive filling operations to prepare the land for any residential construction (R. 65-66).

The Commission further found that the area has become blighted by reason of the foregoing conditions; that it has not been and cannot be effectively developed for its proper use through the normal process of private action; and that municipal aid is essential to reassemble, redesign and replan the area in order to: eliminate such blight and blighting conditions; promote the orderly growth of the municipality; permit the relocation therein of light industrial uses displaced by urban renewal and slum clearance activities elsewhere in the City, thereby facilitating such activities; and to strengthen the economy of the City of New York by stemming the outmovement of industry from the City resulting from shortage of space or displacement by urban renewal activities or other public improvements (R. 27, 28).

4. Sociological and historical facts.

The sociological and historical facts, of which the Court may take judicial notice * and which are set forth in the Appendix hereto, demonstrate that:

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* *Matter of Muller* v. *Oregon*, 208 U. S. 412, 420-422 (1905); *Redevelopment Agency of the City* v. *Hayes*, 11 Cal. 62, 266 P. 2d 105, 124 (Dist. Ct. of Appeals, Calif. 1954), cert den., *Van Hoff* v. *Red. Agency*, 348 U. S. 897 (1954); *People ex rel. Puerto Rico* v. *Eastern Sugar Associates*, 156 Fed. 2d 316, 325 (C. C. A., First Circuit, 1946), cert. den. 329 U. S. 772 (1946).

1. The reclamation of predominantly vacant, economically "dead" areas is an indispensible adjunct to slum clearance and prevention.

2. Vacant dead areas constitute blight, impair the sound growth of the community and tend to create slums and blighted areas.

3. The continued existence of vacant, unusable and unmarketable dead areas without redevelopment contributes to the outmovement of industry from the City, discourages new industry from moving into the City and is a threat to the general welfare and economic prosperity of the City.

4. The economic needs of the Borough of Brooklyn indicate that redevelopment for industrial uses will not only prevent development of slums but will promote the sound growth of the Borough by reversing the out-movement of persons and business and providing employment for 4,500 to 6,000 persons.

ARGUMENT

No substantial federal question is presented by the attempted appeal.

(1) Clearance and redevelopment of a vacant blighted area is a public use.

It is a well settled principle that the due process clause of the Federal Constitution does not bar the use of eminent domain to reclaim and redevelop a predominantly vacant economically dead area, with or without a finding of tangible blight, for the purpose of promoting the sound growth of the community and preventing the development or spread of slums.

In *Berman* v. *Parker*, 348 U. S. 26 (1954), the owners of commercial property which was not substandard challenged the constitutionality of the District of Columbia

Redevelopment Act of 1945 (D. C. Code 1951 §§ 5-701—5-719), particularly as applied to the taking of their property. The Act authorized the acquisition of a "project area" which it defined as "an appropriate unit of redevelopment planning" and also provided (§ 5-702 sub. a) that:

> "For the purposes of Sections 5-701 to 5-719, 'redevelopment' also includes the replanning, redesigning, and original development of undeveloped areas which, by reason of street layout, lof layout, or other causes, are backward and stagnant and therefore blighted and for which planning and land assembly are deemed necessary as a condition of sound development."

The District Court had upheld the Act upon the narrow interpretation that it authorized seizure of property only for the purpose of eliminating conditions injurious to the public health, safety, morals and welfare. (117 Fed. Supp. at p. 719.) This Court affirmed the judgment of the District Court but only "as modified by this opinion" (348 U. S. at p. 36). Mr. Justice Douglas, writing for the unanimous Court, rejected the limited interpretation of the District Court, stating (pp. 34, 35):

> "The experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area muse be planned as a whole. It was not enough, they believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns."
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> • • •
>
> "The District Court below suggested that, if such a broad scope were intended for the statute, the standards contained in the Act would not be sufficiently

definite to sustain the delegation of authority, 117 F. Supp. 705, 721. We do not agree. We think the standards prescribed were adequate for executing the plan *to eliminate not only slums as narrowly defined by the District Court but also the blighted areas that tend to produce slums.*" (Emphasis added.)

A subsequent challenge to the same Act, as applied to a non-slum area situated between a waterfront area and an area of blight, was rejected by the Court of Appeals on the authority of the *Berman* decision and a petition for certiorari was denied by this Court. *Donnelly* v. *District of Columbia Redevelopment Land Agency*, 269 Fed. 2d 546 (1959), cert. den. 361 U. S. 949 (1960).

The *Berman* decision also became the foundation for an overwhelming and uniform weight of judicial authority in the various States, sustaining, as not barred by the due process clause, the use of condemnation to reclaim and develop predominantly vacant economically dead areas such as that authorized in the subject statute and project. *Wilson* v. *Long Branch*, 27 N. J. 360, 142 Atl. 2d 837 (Sup. Ct. of New Jersey, 1958); cert. den. 358 U. S. 873 (1958); *People* v. *Chicago Land Clearance Commission*, 14 Ill. 2d 74, 150 N. E. 2d 792 (Sup. Ct., Ill., 1958); Opinion of the Justices 341 Mass. 760, 168 N. E. 2d 858 (Sup. Jud. Ct., Mass., 1960); *Dodge* v. *Prudential Insurance Company of America*, not officially reported, 179 N. E. 2d 234, 241 (Sup. Jud. Ct., Mass., 1961); Opinion of the Justices 334 Mass. 760, 135 N. E. 2d 665, 667 (Sup. Jud. Ct., Mass., 1956); *Redevelopment Agency of the City, etc.* v. *Hayes*, 11 Cal. 62, 266 P. 2d 105 (District Court of App., Calif.); cert. den.; *Van Hoff* v. *Red. Agency*, 348 U. S. 897 (1954). For judicial decisions to the same effect, which did not cite the *Berman* case, see: *People* v. *City of Chicago*, 414 Ill. 600, 111 N. E. 2d 626 (Sup. Ct., Ill., 1953); *Oliver* v. *City of Clairton*, 374 Pa. 333, 98 Atl. 2d 47 (Sup. Ct., Pa., 1953); *Schenck* v. *City of Pittsburgh*, 364 Pa. 31, 70 Atl. 2d 612 (Sup. Ct., Pa., 1950). See also: Robbins and Yankauer,

Eminent Domain in Acquiring Subdivision and Open Land in Redevelopment Programs: A Question of Public Use, set forth in *Urban Redevelopment: Problems and Practices,* edited by Coleman Woodbury.

Accordingly, when an appeal was sought to be taken from a judgment of the District Court of Appeals of California upholding the use of condemnation for the reclamation and redevelopment of a vacant blighted area, this Court dismissed the appeal for want of a substantial federal question. *Fellom* v. *Redevelopment Agency,* 157 Cal. App. 2d 243, 320 P. 2d 884, 887 (Dist. Ct., App., Cal., 1958), app. dism. 358 U. S. 56 (1958).

Furthermore, this Court has denied certiorari and left undisturbed the judgments of: (a) the Supreme Court of New Jersey upholding the constitutionality of the condemnation of vacant dead area and the redevelopment thereof for non-residential use; *Wilson* v. *Long Branch, supra;* (b) the California Court of Appeals upholding condemnation and redevelopment of a vacant dead area under the same statute involved in the *Fellom* case; *Redevelopment Agency of the City and County of San Francisco* v. *Hayes, supra,* and (c) the Supreme Court of Errors of Connecticut sustaining condemnation and redevelopment of a non-slum area consisting of substandard wooden structures located on small lots and bordering on a complexity of poorly arranged streets. *Graham* v. *Houlihan,* 147 Conn. 321, 160 Atl. 2d 745, 749 (Sup. Ct. of Errors, Conn., 1960), cert. den. 364 U. S. 833 (1960).

The legislative determination of the challenged statute that acquisition and redevelopment of an economically vacant dead area, with or without tangible blight, are a public use for which condemnation may be exercised, is consistent not only with determinations of legislatures of other states, as indicated in the foregoing judicial decisions, but also with the determination of Congress, as expressed in the National Housing Act [42 U. S. Code § 1460, subd.

(c)]. That section expressly authorizes the use of federal funds (1) to aid in the acquisition of land "which is predominantly open and which because of obsolete plotting, diversity of ownership, deterioration of structures or of site improvements or otherwise, substantially impairs or arrests the sound growth of the community" and (2) for redevelopment of such land for predominantly *non-residential* uses "if • • • such redevelopment is necessary and appropriate to facilitate the proper growth and development of the community in accordance with sound planning standards and local community objectives and to afford maximum opportunity for the redevelopment of the project area by private enterprise." See *Blachman* v. *Erie-View Corp.*, 30 L. W. 2609, (U. S. D. C., N Ohio, 1962).

(2) Existence of tangible blight is immaterial.

The plaintiffs' claim of unconstitutionality because there is allegedly no tangible physical blight in the project area and no finding with respect thereto by the City Planning Commission raises no substantial federal question.

In each of the above cited cases which dealt specifically with reclamation of a vacant dead area, the holding of constitutionality was not based upon the existence of any tangible physical blight. On the contrary, a similar contention, advanced in *People* v. *Chicago, supra*, was expressly rejected by the Illinois Court as follows (111 N. E. 2d at p. 634):

> *"It will not do to assert that only the tangible physical characteristics of land may constitute an appropriate subject of legislative concern.* It is true that with the exception of deteriorated site improvements such as streets, sewers, water mains, and the like, the impairments dealt with by the legislature in the present statute are not of a tangible character. But that does not make them less real, and if their effect is to render land unmarketable and thereby to

> force an abnormal pattern of residential growth, no valid reason suggests itself why the legislature may not intervene or why it may not use to describe those areas such shorthand terms as it sees fit. For the legislature to define such areas as 'blighted' is unquestionably within the legislative competence. Cf. Concrete Materials Corp. v. Gordon, 395 Ill. 203, 69 N. E. 2d 841." (Emphasis added.)

See also: *Graham* v. *Houlihan*, 147 Conn. 321, 160 Atl. 2d 745, 750 (Sup. Ct. of Errors, Conn. 1960), cert. den. 364 U. S. 833 (1960).

(3) Redevelopment for industrial use, in accordance with a public plan, is in furtherance and not in derogation of the public use.

The constitutionality of the taking in the present case is clearly not subject to challenge because the public purpose is to be achieved through redevelopment of the area by private persons for industrial uses in accordance with the public plan. This Court and the courts of other jurisdictions have definitively held that the means of executing a project are for the legislature, and the legislature alone, to determine, once the public purpose has been established; and the mere fact that the land in a project area will be resold for private use with restrictions to prevent recurrence of blighted conditions, does not diminish the "public use" and "public purpose" served by the reclamation and redevelopment. *Berman* v. *Parker*, 348 U. S. at p. 33; *Murray* v. *LaGuardia*, 291 N. Y. 320, 52 N. E. 2d 884 (1943), cert. den. 321 U. S. 771 (1943); *64 St. Residence* v. *City of N. Y.*, 4 N. Y. 2d 268, 150 N. E. 2d 396 (1958); cert. den. 357 U. S. 907 (1958); *Matter of Mayor, etc. of N. Y.*, 135 N. Y. 253, 261, 31 N. E. 1043 (1892); *Matter of Cooper*, 28 Hun 515, 525 (1st Dept., 1883), app. dism. 93 N. Y. 507 (1883); *Peo. of Puerto Rico* v. *Eastern Sugar Associates*, 156 Fed. 2d 316, 323 (C. C. A., 1946), cert. den. 329 U. S. 712 (1946); *Davis* v. *City of Lubbock*, 160 Tex. 38, 326 S. W. 2d 699, 707 (Sup. Ct. of Texas, 1959; *Wilson* v. *Long Branch*, 27 N. J.

360, 142 Atl. 2d 837, 846 (Sup. Ct. of New Jersey, 1958), cert. den. 358 U. S. 873 (1958); *Peo.* v. *City of Chicago*, 414 Ill. 600, 111 N. E. 2d 626, 633-634 (Sup. Ct., Ill., 1953); *Redevelopment Agency of the City of Hayes*, 11 Cal 62, 266 Pac. 2d 105, 123 (Dist. Ct. of App. of Calif.), cert. den. 348 U. S. 897 (1954).

Thus, in *Wilson* v. *Long Branch, supra*, this Court refused to disturb a judgment upholding the redevelopment by private persons of a predominantly vacant dead area for *non-residential* use. And redevelopment of such an area for *non-residential* purposes was also sustained by the Supreme Court of Illinois, which stated that "elimination of a blighted vacant area as defined in the Act is itself a public purpose, regardless of the type of redevelopment thereafter." *People* v. *Chicago Land Clearance Commission*, 150 N. E. 2d 792, 795 (Sup. Ct., Ill., 1958).

Finally, as such redevelopment is indispensably related to the promotion of the prosperity of the community, the exercise of condemnation in its behalf is supported by long established judicial precedent in this Court and other jurisdictions. *People of Puerto Rico* v. *Eastern Sugar Associates*, 156 Fed. 2d 316, 323-324 (C. C. A. First Circuit, 1946), cert. den. 329 U. S. 772 (1946); *Atwood* v. *Willacy County Navigation District*, not offiically reported; 271 S. W. 2d 137 (Ct. of Civ. App. Tex., 1954); *app. dism.* 350 U. S. 804 (1955); *Murray* v. *LaGuardia, supra*, 291 N. Y. at pp. 326, 331; *Matter of New York City Housing Authority* v. *Muller, supra*, 270 N. Y. 333, 339, 1 N. E. 2d 353; *Matter of Mayor, etc. of N. Y.*, 135 N. Y. 253, 262-263 (1892); *Matter of Cooper*, 28 Hun 515-522, 525 (1st Dept., 1883), app. dism. 93 N. Y. 507 (1883); *McConnell* v. *City of Lebanon*, 203 Tenn. 498, 314 S. W. 2d 12, 20 (Sup. Ct. Tenn., 1958); *Schenk* v. *City of Pittsburg*, 364 Pa. 31, 70 Atl. 2d 612, 615-616 (Sup. Ct., Pa., 1950); *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 163 (1896); *Nichols on Eminent Domain, Second Edition*, Vol. 1, pp. 130-131.

(4) The cases cited by appellants fail to sustain their position.

Opinion of the Justices, 332 Mass. 769 (Sup. Jud. Ct. Mass. 1955), upon which appellants rely, cannot sustain their contention, since their interpretation of that case was expressly rejected by the Supreme Judicial Court of Massachusetts in its subsequent decisions. *Opinion of the Justices*, 334 Mass. 760, 135 N. E. 2d 665, 667 (1956); *Opinion of the Justices*, 341 Mass. 760, 168 N. E. 2d 858, 868 (1960); *Dodge* v. *Prudential Insurance Co. of America*, not officially reported; 179 N. E. 2d 234, 241 (1961).

Opinion of the Justices, 152 Me. 445, also cited by the appellants, is distinguishable since the act construed was designed solely to provide for industrial expansion in the City of Bangor. The act which is challenged in the present case is designed specifically to *prevent the development and spread of slums* through the reclamation of vacant dead areas and redevelopment thereof for residential, commercial, industrial, community, public or other use or combinations of such uses. (Gen. Mun. Law, § 72-n, subd. 3.) Thus, industrial redevelopment in accordance with a plan is merely one of the several methods by which the public purpose declared in the statute (*i.e.*, the prevention of the development and spread of slums) can be effected.

(5) Judicial attitude toward State Legislative and judicial determinations of public use, supports contention of City of New York.

As noted above, the State Legislature has expressly declared that the exercise of eminent domain for the purposes declared in the statute is for a public use.

Such a declaration, unless "palpably without reasonable foundation", is clearly entitled to weight. *Murray* v. *LaGuardia*, 291 N. Y. 320, 329, 52 N. E. 2d 884 (1943), cert. den. 321 U. S. 771. The question of what constitutes a "public use" is deemed to be a matter for the Legislature to determine, and when the Legislature has done so the role

of the judiciary with respect to that question is "an extremely narrow one". *Berman* v. *Parker*, 348 U. S. 26, 32-34 (1954); *U. S. ex rel. Tennessee Valley Authority* v. *Welch*, 327 U. S. 546, 551-552 (1946). In the words of Mr. Justice Stone, "* * * it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court. * * * The present case exhibits no such departure". *Carmichael* v. *Southern Coal*, 301 U. S. 495, 515 (1936).

Furthermore the highest Court of the State has also held that the present condemnation is for a public use. Referring to such an instance, this Court has said, "No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the State court as a taking for public uses in conformity with its laws" *U. S. ex rel. T. V. A.* v. *Welch*, 327 U. S. 546, 552 (1945).

In view of the foregoing, it is submitted that the question sought to be presented by this appeal has so repeatedly and uniformly been decided adversely to the appellants' contentions that no substantial question is presented entitling appellants to invoke the jurisdiction of the Supreme Court of the United States.

CONCLUSION

Appellant has presented no substantial federal question for resolution by this Court. The appeal should be dismissed.

June 19, 1962.

Respectfully submitted

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APPENDIX

Historical and Sociological Data

1. *Reclamation of vacant dead areas as an adjunct to slum clearance and prevention.*

The menace of slums in New York City and other larger cities of the State has been officially recognized since the middle of the nineteenth century as a grave problem requiring public action. Through the years, efforts were made to cope with the problem through restrictive legislation such as building and housing codes, zoning regulations enacted in the exercise of the police power, and the taxing power. (See: *Matter of New York City Housing Authority* v. *Muller*, 270 N. Y. 333, 341, 1 N. E. 2d 353, 1936.) By 1926, however, it became apparent that these powers alone were inadequate to cure the slum conditions, and that the exercise of condemnation was necessary to eliminate the inherent evil (L. 1926, ch. 823; L. 1934 ch. 4). At that time, it was thought that the use of condemnation to provide low rent housing would constitute the major remedy. (See: *Matter of New York City Housing Authority* v. *Muller*, 270 N. Y. at p. 341.) By 1939, it was realized that slum clearance had to be regarded as a separate and distinct purpose, to be carried out in conjunction with other well balanced and necessary land re-uses, including but not limited to low rent housing. (See: N. Y. Const. 18 § 1 and *Murray* v. *La Guardia*, 291 N. Y. 320, 327, 52 N. E. 2d 884, 1943.) However, it was not until Federal aid for such purposes was authorized by the Federal Housing Act of 1949, that a program of direct slum clearance and redevelopment could be initiated. In this program, slum areas were acquired and demolished and replaced by balanced communities comprising commercial, residential, institutional, educational, public and other uses, with proper safeguards to prevent recurrence of slum conditions. (See: Gen. Mun. Law §72-k.)

This frontal attack on slums continued to be the central weapon in the City's battle against slums until 1956, when a change in urban renewal philosophy occurred. [See National Housing Act of 1956, 42 U. S. C. § 1460 subd. (c).] Erperience had shown that redeveloped areas, while adequate to protect the immediate area from a recurrence of slums and blight, had collateral effects requiring further public action in order to protect the sound growth of the municipality as a whole, to prevent the development of slums in other areas, to avoid the movement of large numbers of residents and businesses out of the City, and to encourage new industries to settle within the City. This result stems from the fact that redeveloped areas are planned and built on the basis of modern standards of beneficial land uses, reduced density, construction, open spaces, parking, off-street loading, recreational and other incidental facilities. Consequently, redeveloped areas, especially former high density areas, have been able to accommodate substantially fewer residents and business establishments than were accommodated by slums which they replaced.

Moreover, during the entire period in which the City has been engaged in its fight to eradicate and prevent slums, the City has also been growing. Its needs for public improvements have expanded considerably. Schools, health centers, hospital, sewage disposal plants, bridges, tunnels, highways, expressways, and transit facilities have not only reshaped and recast the destinies of varios sections of the City,—they have also displaced and continue to displace homes, business establishments and other community uses.

The magnitude of such displacement is dramatically indicated by the figures which have been compiled merely for the period from January 1, 1954 to October 31, 1959. These demonstrate that in a period of somewhat less than 5 years, 78,242 families and 10,389 commercial establishments re-

quired relocation as a result of slum clearance and other public improvements (J. Anthony Panuch "Relocation in New York City, Special Report to Mayor Robert F. Wagner," dated December 15, 1959, pp. 24, 39).

The impact of these facts is self-evident: As slums are cleared and public improvements constructed, there is a need for more land to take care of displaced community uses (e.g., residential, commercial, industrial, institutional, recreational, educational, public, etc.) uprooted by slum clearance or other public improvements. Thus, if the slum clearance program is to be truly effective, it must be accompanied by other programs having as their basic objectives: (a) to arrest or prevent deterioration in existing areas of the city and conserve or salvage such areas, so as to reduce as far as possible the need for further displacement of existing beneficial land uses or public facilities; and (b) to expand and utilize the City's total available land resources to their utmost capacity, subject however to the observance of those standards of planning, land use and construction which will insure the growth and development of sound and prosperous communities in the City.

In the second of these objectives the availability of marketable vacant land is a crucial factor. Because there is an acute shortage of usable vacant land in the City of New York, such land is now a precious resource. Its waste obstructs and impedes the vitally important programs for the elimination and prevention of slums and needed public improvements and arrests the sound growth of the City.

Studies and estimates of the Department of City Planning indicate that the net acreage of vacant land for all the boroughs of the City in 1959, was 23,700. About 10% of such land is under water between shore lines and bulkhead lines and another 14% in marshes. Moreover approximately 40% of all such vacant land (except in Staten Island) consists of scattered small tracts less than three

acres in size which are difficult to utilize efficiently and will be slow in development. Of the tracts which are three acres or more in size, 1750 acres are economically "dead" areas which cannot be reclaimed and redeveloped for sound and appropriate land uses without public action. These areas are characterized by some or all of such conditions as: subdivision of land into lots of such irregular form and shape or such insufficient size, depth or width as renders them incapable of effective or economic development; obsolete and poorly designed street patterns with inadequate access to such vacant or predominantly vacant areas or street widths or block sizes which are unsuitable for appropriate development in such areas; unsuitable topographical, subsoil and other physical conditions impeding the development of appropriate land uses; an obsolete system of utilities serving the area; buildings and structures unfit for use and occupancy as a result of age, obsolescence, dilapidation, inadequate maintenance, or other factors affecting their physical condition; dangerous, unsanitary or otherwise improper uses and conditions which adversely affect the public health, safety and general welfare; or scattered improvements which, because of their incompatibility with an appropriate pattern of land use and streets, retard the development of the land.

It is estimated by the Department of City Planning that proper redevelopment of such vacant "dead" areas in the City of New York could provide an additional 20,000 residential units, and facilities for commercial or industrial establishments giving employment to 40,000 persons. The proposed redevelopment of the Flatlands project area, which the plaintiffs are attacking in this suit, is expected to accommodate industrial facilities giving opportunities for employment to approximately 4,500 to 6,000 persons.

The National Housing Act of 1956 took cognizance of the necessity for both indispensable objectives outlined

above, when it provided federal aid for (a) rehabilitation and conservation in addition to slum clearance and redevelopment [42 U. S. Code § 1460 subd. (c)], and (b) acquition of land "which is predominantly open and which because of obsolete plotting, diversity of ownership, deterioration of structures or of site improvements or otherwise, substantially impairs or arrests the sound growth of the community" and for redevelopment of such land for predominantly non-residential uses "if the governing body of the local public agency determines that such redevelopment is necessary and appropriate to facilitate the proper growth and development of the community in accordance with sound planning standards and local community objectives and to afford maximum opportunity for the redevelopment of the project area by private enterprise" [U. S. Code § 1460 subd. (c)].

State legislation to authorize such programs in the State of New York, followed closely upon the broadening of the Federal Urban Renewal Law. Gen. Mun. Law §§ 72-l and 72-m were enacted in 1956 and 1957, respectively, to authorize conservation and rehabilitation programs. General Municipal Law, § 72-n, which is under attack in this action, was enacted in 1958, to authorize effectuation of the second objective, namely, the reclamation and redevelopment of vacant "dead" areas, and to close the gap in the overall program caused by vacant dead areas which cannot be assembled and redeveloped without public aid.

2. *Vacant dead areas constitute blight, impair the sound growth of the community, and tend to create slums and blighted areas.*

In "A Study of Blighted Vacant Land" prepared for the Chicago Land Clearance Commission by the Chicago Plan Commission in 1950, the Commission stated:

> "The existence of idle land which is unavailable under reasonable conditions, yet is ripe for de-

velopment, has come to be considered as a form of urban blight. Where formerly the term, 'blight', reflected a high incidence of structural dilapidation, inadequate sanitation, overcrowding, and other slum conditions, the concept has now been broadened because a city may suffer both *economically and socially* when vacant land cannot be developed properly and tends to impair the sound growth of the community.

This extension of the concept of urban blight has now been written into both State and Federal legislation." (Emphasis added.)

Writing on the same theme in the University of Chicago Law Review (Vol. 25, Winter 1958, No. 2, "The Federal Urban Renewal Program", p. 303), Quinton Johnstone, Associate Professor of Law at Yale Law School, states:

"Blighted areas may also consist of such vacant land parcels as dead subdivisions and vacant lots in rundown communities. Some observers have added as a characteristic of blight that the area is stagnant or deteriorating instead of improving, others that the urban depreciation and renewal cycle is in an abnormally severe decline. Still another characteristic of blighted areas is that they are economic liabilities to local government for they almost always produce less in tax revenue than the cost of the public services they receive, such as police and fire protection and welfare assistance."

Vacant "dead" areas are also a drain upon the municipal facilities and treasury. Various municipal services must be provided to vacant areas and to built up areas alike. The Housing Authority of Cook County, Illinois in its Report of March, 1949 to the State Board of Housing entitled "Dead Land—A Report to the Illinois State Housing

Board" (p. 20), summarized this drain upon the municipality as follows:

"POLICE. Abandoned subdivisions which lie in proximity to established neighborhoods invariably require regular police patrolling to combat loitering, use for immoral purposes, and criminal refuge.

"FIRE. Grass fires occurring in 'dead' land areas not only represent a direct, extra municipal expenditure but also endanger adjacent built-up areas.

"SEWER. In all communities where 'dead' land is improved with storm or sanitary sewers or both, at least a minimum of maintenance service must be performed even on the unused portions. A number of municipalities maintain their sewer lines in 'dead' land at an even higher level in order to preserve the lines for future use.

"WATER. When the water lines in 'dead' land sections are important parts of the local distribution system they must be maintained at the same level of efficiency as the remainder of the system. If not of such importance they must still be preserved in good condition for future use.

"STREETS. Especially in the case of thorofares, streets in 'dead' land sections require virtually the same care as those in built up areas. This includes cleaning of litter, snow removal and physical maintenance.

"STREET LIGHTING. If streeets are thorofares providing access to built up sections, at least a minimum of lighting must be available.

"WEED CONTROL. Dead land is a primary source of obnoxious weed annoyance and many municipalities must bear a direct cost for the cutting or mow-

> ing of 'dead' vacant lots or subdivisions. If this service is needed but not given, the expense is often transferred to citizens who must secure medical service for allergies or who must expend additional sums for control of weed-seeds blown from the 'dead' land areas."

The same study (pp. 21-22) also noted the expenses to the municipality of serving new developments on the outskirts of the city while vacant "dead" land adjacent to older built up areas, (such as the instant site) are unusable:

> "In communities where 'dead' land areas lie adjacent to older built up areas, new building is often forced to the outskirts of the corporate limits or into unincorporated areas. If these areas of new building are located within municipal boundaries, the municipalities must, of course, extend services to the new developments. This applies in all cases to police, fire and similar services and may at times include extension of sewer and water lines. This 'long haul' has the same effect on the tax rates as did the 'spreading thin' noted in the case of scattered development, the unit cost of servicing being increased by the necessity of traversing vacant non-productive areas. By the same token, development of such non-revenue producing areas would decrease the unit cost of services."

In "The Future of Cities and Urban Redevelopment," edited by Coleman Woodbury (1953, pages 516 and 517), Victor Jones writes as follows with respect to blighted undeveloped land:

> "The loss in tax revenues from idle and delinquent land is tremendous, but the principal concern over the problem is its social and economic effects

on the community as a place to live, work, and play. Unused and chronically delinquent land has been called 'dead' land by the Cook County Housing Authority because it is

> 'land which is used by nobody and very often is, in effect, owned by nobody. * * * Because of the [tax] encumbrances, the lost ownership or the owner's indifference, the legal difficulties, and the tediousness of existing remedies, the land is virtually unavailable to those who can and would develop it.'
>
> * * *
>
> The Cook County Housing Authority emphasizes the indirect costs of 'dead' land: It increases the cost of servicing existing homes, requires expensive extensions to service new areas, depreciates property values in the neighborhood, increases the capital cost of housing, prevents an increase of tax revenues to the taxing unit in which the 'dead' land lies, contributes to disorderly metropolitan expansion, and makes it difficult to plan for desirable and economic uses of all the land in the particular locality and in the metropolitan area."

In discussing a statute similar to General Municipal Law § 72-n, enacted by the Illinois State Legislature, the Chicago Plan Commission in "A Study of Blighted Vacant Land", cited above, analyzed the effects of vacant dead areas on sound community growth as follows (pp. 13-15):

> "The primary purpose of the statutory provisions is to permit acquisition of vacant land which impairs sound community growth. What is sound community growth, and how do unused subdivisions impair that growth?
>
> "Unused subdivisions impair sound community growth because they are located near employment

centers, near good mass transportation, and in areas suitable for homes, and yet are not available for use because of diversity of ownership, obsolete platting, and tax delinquency."

Sound Community Growth

Sound community growth usually reveals the following characteristics:

1. Harmonious relationships between land uses throughout the metropolitan area.

2. *Balance between employment and population.*

a) *An adequate number and kind of employment opportunities to support the population of the area.*

b) *Diversity of employment opportunities in each section of the metropolitan area sufficient to provide relative economic stability and to offer considerable latitude to the residents of each section of the metropolitan area in the selection of jobs.*

c) *An adequate number of various kinds of sites available for industrial and commercial development to provide for a balanced, stable, economic growth of the community.* (Emphasis added.)

3. Development sufficiently compact to constitute an economical and efficient use of space.

a) Utilities and public services provided with reasonable economy, free from excessive investment and maintenance in unoccupied or sparsely occupied areas.

b) The cost of community living as measured in time, money, and energy, minimized by reduc-

ing friction and conflicts in the functioning of the community area.

c) Public transportation adequate for the needs of the residents and businesses of the community economically provided.

4. Adequate space for community facilities and amenities in proportion to the needs of the population: shopping areas; parking space, playgrounds, parks, school sites, churches, and other institutions.

5. An environment conducive to safety, and to physical and mental health.

6. Sufficient shelter, adequate in amount and kind, for the population.

a) A sufficient variety of types of dwelling units, residential structures, and neighborhoods to allow freedom of choice.

b) A sufficient variety of locations of residential development of each type to permit selection.

7. Adequate tax revenue to support public services in quality and quantity to supply the needs of the community as a whole.

8. *It takes place at times when land improvements are readily marketable.* (Emphasis added.)

* * *

Blighted vacant land impairs the sound growth of the city because such gaps in the city structure cause greater length of sewer and water mains, since these utilities have to be built through areas that have no houses. These extensive vacant areas inside the city are needed because the size and type of building operations have changed since 1940. * * *

Again, blighted vacant land impairs sound city growth because a substantial proportion of the lots yield no taxes at all, while they incur costs of fire and police protection, weed control and lighting, almost as much as if they were built upon, because vacant areas are hazards from the standpoint of crime and brush fires. Since these areas cost more than they yield in taxes, they add to the tax bills of those who occupy homes."

In summarizing its conclusions the Chicago Plan Commission further stated (p. 25):

"All of the subdivisions analyzed in connection with this report possess in some measure characteristics that impair sound community growth. In each case, there exist diversity of ownership, obsolete platting, and tax delinquency. * * * It is a fact that even individual lot owners who have kept their taxes paid to date cannot in most cases build upon their lots because they are too narrow, and even if they financed a home upon their land, they would still be located in an obsolete block layout and in a neighborhood without proper provision for essential utilities, recreation areas, and for diverting through traffic. The individual owner is powerless to change the rigid framework in which his lot is set, because it is necessary to acquire the interests of all the owners in the subdivision in order to wipe out the old pattern and replat the area according to modern standards. The owner who has paid his taxes will receive fair compensation for a property which he cannot use to the advantage of himself or his family."

3. *Vacant dead areas cause tangible physical blight.*

It is a well-known fact that vacant dead areas naturally invite forms of tangible physical blight. For example, the

records of various City Departments with respect to the proposed Flatlands project area for the years 1958 and 1959 show complaints regarding the existence of garbage and rats; ragweed; unclean lots; emission of dense smoke by reason of illegal open fires; illegal burning of old automobiles; rubbish, brush and grass fires (of which there were an average of 15 a month during the period from January 1, 1959 through August 1, 1959); abandonment of old auto bodies on vacant lots; wildcat dumping; storage of wrecked cars outside of auto wrecking yards; and storage of empty and wooden boxes on open lots, leading to numerous fires. Furthermore, even a superficial view of the Flatlands project area provides a convincing demonstration of the tangible physical blight which is the inevitable incident of vacant areas characterized by conditions such as those described in General Municipal Law § 72-n or in the findings of the City Planning Commission in this case. The extensive and unsightly litter and rubbish, neglected lot maintenance, overgrowth of weeds and grass, ungraded and almost untravelable dirt roads and undesirable land uses add up unmistakably to tangible physical blight. Thus, while a formal finding of tangible physical blight is not a prerequisite to the reclamation and redevelopment of a vacant dead area, the fact that such areas cause tangible physical blight provides further confirmation of the legislative declaration that the reclamation and redevelopment of such areas is necessary to promote and protect the public health, safety and general welfare. (Gen. Mun. Law § 72 subd. g.)

4. *The continued existence of vacant, unusable and unmarketable dead areas without redevelopment contributes to the outmovement of industry from the City, discourages new industry from moving into the City and is a threat to the general welfare and economic prosperity of the City.*

In enacting General Municipal Law § 72-n, the Legislature provided for the reclamation and redevelopment of

vacant dead areas for "residential, commercial, industrial, community, public or other uses or combinations of such uses" (Subd. 7). In so doing it recognized that no community can exist for residential purposes only, without relation to other proper land uses, whether they be industrial, business, institutional, recreational or otherwise. Soundly planned redevelopment makes the difference between urban decline and the revival of healthy municipal growth. The law recognizes that municipalities must take action to provide for balanced redevelopment of urban areas or resign themselves to the continuance of congestion, deterioration, obsolescence and impairment of economic and financial prosperity of the community.

The necessity for a program of industrial redevelopment is definitely indicated by recent studies. In "Anatomy of a Metropolis" by Edgar M. Hoover and Raymond Vernon (Harvard University Press 1959) the authors point out that New York City has lagged in the growing industries while holding its own in the shrinking ones (p. 30). The outward shift of industry, particularly in recent decades, is mainly attributable to the search for space. Messrs. Hoover and Vernon point out that it is not simply a question of finding more factory room for more machines, for this could be accomplished by adding a floor or two to existing structures. Rather, the structures themselves are no longer the right type. One of the most universal changes in factory processes over the past thirty or forty years has been the widespread introduction of continuous-material-flow-systems and of automatic controls in processing. As a result facilities frequently require more horizontal space rather than vertical space.

An informal sample study made for the Department of City Planning in 1958 indicated that 41 commercial and industrial firms had moved into the City of New York in 1958 while 109 had moved out of the City during the same period, leaving a net loss of 68 firms. Thus, a side effect of

the over-all program for the elimination and prevention of slums, the construction of needed public improvements and the unmarketability and disuse of vacant dead land, is the inability of business enterprises to find adequate facilities in the City. Such a result, particularly in a city such as New York whose prosperity has always been linked to its eminence as a headquarters for business and industry, can have a serious effect upon the prosperity and general welfare of its inhabitants. The need to provide areas for appropriate commercial and industrial development, with the substantial employment opportunities which they make available to the population, is as important to the life of the community as is the need to provide housing, schools, tunnels, bridges, streets, and other public improvements.

Thus, the existence of vacant dead areas of the type specified in General Municipal Law § 72-n shrinks the urgently needed land resources of the city and forces not only residents but also business establishments to move out beyond the City limits in order to obtain available space. Though the city has built up enormous and expensive facilities to service its population, overcrowded conditions cause many of its inhabitants and business firms to drift away either to outlying undeveloped areas or to places outside the City. The result is a waste of the City's facilities, loss of revenue to the City, loss of employment opportunities for its inhabitants, and a detrimental effect upon its prosperity. By reclaiming vacant dead areas such as those described in General Municipal Law § 72-n, a reversing effect upon the trend towards the movement of persons and businesses away from the City may be achieved.

However, reclamation of such areas cannot be accomplished without the exercise of eminent domain to provide compulsory land assembly. Diversity of ownerships, complicated titles, lots unsuitable for building, and tax delinquency make land assembly by private action practically impossible.

5. *The proposed redevelopment of the Flatlands area is in harmony with the economic and sociological needs of the Borough of Brooklyn and with the sound growth of the Borough.*

The Preliminary Report (R. 60, Exh. E, p. 6) notes that during the period between 1947 to 1954, manufacturing employment in Brooklyn increased only 2.6% while such employment in Queens and in the Bronx increased 30% and 27% respectively.

In a 1955 survey made by the Brooklyn Chamber of Commerce of firms which had left Brooklyn, 81% reported that they moved through lack of room for expansion. Moreover, inquiries by the New York State Department of Commerce among more than fifty plants which had left Brooklyn in the period between 1950 and 1956 showed that the need for more space was a prime motivating factor in their relocation. Firms whose premises had been condemned to permit civic improvements were often unable to find suitable substitute quarters elsewhere in Brooklyn, and this space shortage was experienced by small firms which required modern, one story factory facilities, as well as by large firms. In the older manufacturing areas, inadequate parking space and congested traffic conditions also constitute major handicaps even when firms find operating conditions adequate in older multi-story buildings.

These unfavorable factors have resulted in the loss of several thousand industrial positions in Brooklyn. They are also partly responsible for the very limited growth of manufacturing in Brooklyn compared with the far greater rate of development in neighboring Queens and the 160% increase in manufacturing employment between 1947 and 1954 in nearby suburban Nassau County. For many industries, adequate space for economic plant operation, truck loading, automobile parking, direct access to rail facilities and proximity to uncongested truck routes are key require-

ments. Such considerations frequently outweigh the advantages of access to markets, skilled labor supply, transportation services, and availability of older factory buildings which otherwise make Brooklyn one of the most favorable locations in Metropolitan New York-Northeastern New Jersey.

The proposed Flatlands project is expected to provide light industrial facilities offering employment for 4,500 to 6,000 persons, thereby constituting an important method of countering the above described trend (R. 60, Exh. E, p. 6).